DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-889
Title: Tarrant Regional Water District, Petitioner
v.
Rudolf John Herrmann, et al.
Docketed: January 19, 2012
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (10-6184)
Decision Date: September 7, 2011
Rehearing Denied: October 21, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jan 19 2012	Petition for a writ of certiorari filed. (Response due February 21, 2012)
Feb 20 2012	Brief amicus curiae of Upper Trinity Regional Water District filed.
Feb 21 2012	Brief of respondent Rudolf John Herrmann, et al. in opposition filed.
Feb 21 2012	Brief amicus curiae of Texas filed.
Feb 21 2012	Brief amicus curiae of North Texas Municipal Water District filed.
Feb 21 2012	Motion for leave to file amici brief filed by City of Irving, Texas, City of Hugo, Oklahoma and Hugo Municipal Authority.
Feb 21 2012	Letter proposing a lodging of non record material received from counsel for amici City of Irving, Texas, et al.
Mar 6 2012	Reply of petitioner Tarrant Regional Water District filed.
Mar 7 2012	DISTRIBUTED for Conference of March 23, 2012.
Mar 26 2012	DISTRIBUTED for Conference of March 30, 2012.
Apr 2 2012	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Nov 30 2012	Brief amicus curiae of United States filed.
Dec 11 2012	Supplemental brief of respondents Rudolf John Herrmann, et al. filed.
Dec 12 2012	DISTRIBUTED for Conference of January 4, 2013.
Dec 12 2012	Supplemental brief of petitioner Tarrant Regional Water District filed. (Distributed)
Dec 20 2012	Lodging received from counsel for amici City of Irving, Texas, et al. in electronic format.
Jan 4 2013	Motion for leave to file amici brief filed by City of Irving, Texas, City of Hugo, Oklahoma and Hugo Municipal Authority GRANTED.
Jan 4 2013	Petition GRANTED.

Feb 11 2013 SET FOR ARGUMENT ON Tuesday, April 23, 2013

Feb 12 2013 Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.

Feb 19 2013 Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.

Feb 19 2013 Joint appendix filed. (Two Volumes) (Statement of costs filed.)

Feb 19 2013 Brief of petitioner Tarrant Regional Water District filed.

Feb 20 2013 Proposal of counsel for petitioners to lodge copies of non-record material which were relied on in their opening brief.

Feb 25 2013 Brief amici curiae of City of Irving, Texas, City of Hugo, Oklahoma, and Hugo Municipal Authority filed.

Feb 25 2013 Brief amicus curiae of North Texas Municipal Water District filed.

Feb 25 2013 Brief amicus curiae of Upper Trinity Regional Water District filed.

Feb 26 2013 Brief amici curiae of Olen Paul Matthews and Michael Pease filed.

Feb 26 2013 Brief amicus curiae of City of Dallas filed.

Feb 26 2013 Brief amicus curiae of United States supporting Vacatur and Remand filed.

Feb 26 2013 Brief amici curiae of Fort Worth Chamber of Commerce, et al. filed.

Feb 26 2013 Brief amicus curiae of Texas filed.

Feb 26 2013 Brief amicus curiae of Texas Water Conservation Association filed.

Feb 26 2013 Brief amici curiae of Cities of Arlington and Fort Worth, Texas filed. (Distributed)

Feb 26 2013 Brief amicus curiae of North Texas Commission filed. (Distributed)

Feb 28 2013 Record Received from the U.S.C.A. for the 10th Circuit. (1-Box.)

Mar 1 2013 CIRCULATED.

Mar 21 2013 Brief of respondent Rudolf John Herrmann, et al. filed. (Distributed)

Mar 27 2013 Brief amicus curiae of Oklahomans for Responsible Water Policy filed. (Distributed)

Mar 27 2013 Brief amici curiae of Louisiana and Arkansas filed. (Distributed)

Mar 27 2013 Brief amici curiae of Republican River Water Conservation District, et al. filed. (Distributed)

Mar 27 2013 Brief amicus curiae of Oklahoma Independent Petroleum Association filed. (Distributed)

Mar 28 2013 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Mar 28 2013 Brief amici curiae of Professors of law and political science filed. (Distributed)

Mar 28 2013 Brief amicus curiae of City of Oklahoma City and Oklahoma City Water Utilities Trust filed.

Mar 28 2013 Brief amici curiae of States of Colorado, et al. filed. (Distributed)

Mar 28 2013 Brief amici curiae of Chickasaw and Choctaw Nations filed. (Distributed)

Mar 28 2013 Proposal of amici Oklahoma City Water Utilities Trust to lodge non-record material.

Apr 9 2013 Lodging consisting of three documents received from counsel for the petitioner. (Distributed)

Apr 12 2013 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Apr 15 2013	Reply of petitioner Tarrant Regional Water District filed. (Distributed)
Apr 23 2013	Argued. For petitioner: Charles A. Rothfeld, Washington, D. C.; and Ann O'Connell, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Lisa S. Blatt, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

11-889

Supreme Court U.S.
FILED
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OFFICE OF THE CLERK

In the Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,

Petitioner,

v.

RUDOLF JOHN HERRMANN ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has held on numerous occasions that a State may not discriminate against interstate commerce in water absent an "expressly stated" or "unmistakably clear" congressional intent to immunize the relevant state laws from dormant Commerce Clause scrutiny. See *Sporhase* v. *Neb. ex rel. Douglas*, 458 U.S. 941 (1982); *So.-Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82 (1984). The questions presented here, which are of vital importance to arid regions of the United States that depend on interstate imports of water and interstate compacts governing access to water, are as follows:

1. Whether Congress's approval of an interstate water compact that grants the contracting States "equal rights" to certain surface water and—using language present in almost all such compacts—provides that the compact shall not "be deemed * * * to interfere" with each State's "appropriation, use, and control of water * * * not inconsistent with its obligations under this Compact," manifests unmistakably clear congressional consent to state laws that expressly burden interstate commerce in water.

2. Whether a provision of a congressionally approved multi-state compact that is designed to ensure an equal share of water among the contracting states preempts protectionist state laws that obstruct other states from accessing the water to which they are entitled by the compact.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court of appeals were appellant Tarrant Regional Water District, a Texas state agency; and appellees Ford Drummond, Ed Fite, Rudolf John Herrmann, Jack W. Keely, Kenneth K. Knowles, Linda Lambert, Jess Mark Nichols, Richard Sevenoaks, and Joseph E. Taron in their official capacities as members of the Oklahoma Water Resources Board and the Oklahoma Water Conservation Storage Commission.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Tarrant Regional Water District, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-52a) is reported at 656 F.3d 1222. The district court's orders granting respondents' motion for summary judgment (App., *infra*, 53a-74a) and motion to dismiss (App., *infra*, 75a-83a) are available at 2010 WL 2817220 and 2009 WL 3922803

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2011. A timely petition for rehearing was denied on October 21, 2011. App., *infra*, 85a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of Article I, Section 8 of the U.S. Constitution provides, in relevant part, that "The Congress shall have power * * * To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The Compact Clause of Article I, Section 10 of the U.S. Constitution provides, in relevant part, that "No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State * * *."

The Supremacy Clause of Article VI of the U.S. Constitution provides, in relevant part, that "This

Constitution, and the Laws of the United States * * * shall be the supreme Law of the Land * * *, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Relevant portions of the Red River Compact (Pub. L. No. 96-564, 94 Stat. 3305 (1980)), are reproduced at App., *infra*, 86a-91a.

Relevant portions of the Oklahoma Statutes Annotated are reproduced at App., *infra*, 92a-96a.

STATEMENT

The question in this case is whether the Red River Compact—an interstate agreement between Texas, Oklahoma, Arkansas, and Louisiana that was intended to assure "equitable apportionment" of water among the signatory States—authorizes Oklahoma to discriminate against Texas consumers in the allocation of water, in a manner that otherwise would violate the Commerce Clause. The Tenth Circuit held that it does, pointing to general language in the Compact that gives the signatory States authority over the water allocated to them within their borders. As a consequence, Oklahoma is using avowedly protectionist rules to prohibit the transfer of water to petitioner Tarrant Regional Water District ("Tarrant"), a political subdivision of the State of Texas responsible for supplying water to nearly two million people.

This holding is wrong in two fundamental respects: it departs from this Court's emphatic direction that congressional intent to waive the requirements of the dormant Commerce Clause must be stated expressly and unambiguously; and it misreads the plain language of the Compact, which allocates

an equal portion of the disputed water to Texas and thereby preempts inconsistent Oklahoma law.

The Tenth Circuit's holding is of enormous significance. It will encourage protectionist legislation by States that participate in the dozens of interstate water compacts that use language indistinguishable from that of the Red River Compact, creating uncertainty about the long-standing network of interstate agreements that governs the allocation of water throughout much of the Nation. More broadly, it undermines the "clear statement" rule governing congressional abrogation of the dormant Commerce Clause that this Court has held vital to prevent economic Balkanization among the States. Most immediately, it denies millions of Texas consumers water that they desperately need and were allocated by the Compact. Review by this Court accordingly is imperative.

A. Texas's water needs and Oklahoma's water reserves

Tarrant is in dire need of new sources of water to serve the nearly two million people that it serves in north central Texas, including in the cities of Fort Worth, Arlington, and Mansfield. CA App. 86. Tarrant's long-term planning shows that by 2060 the population of Dallas-Fort Worth, the fourth largest metropolitan area in the country, will have doubled, and Tarrant's demand for water will exceed supply by more than 400,000 acre-feet per year.[1] *Ibid.* In addition to these long-range needs, Tarrant also

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[1] An acre-foot is the volume of one acre of surface area to a depth of one foot and is the equivalent of approximately 325,000 gallons.

faces an imminent water shortage as a result of drought. *Id.* at 804-805.

As Texas explained in its amicus brief below, Tarrant is "authorized under Texas law" to satisfy these needs by obtaining water supplies "inside and outside of Texas," including by "acquir[ing] water to which Texas has an equal right of use under the Red River Compact." Am. Br. of Texas at 1, *Tarrant Reg'l Water Dist.*, 656 F.3d 1222 (10th Cir. 2011) (No. 10-6184), 2010 WL 4163578. Tarrant has identified water sources within Oklahoma as the most practical means of addressing both its immediate and long-term needs. CA App. 804-805.

Oklahoma sits within the core of the Mississippi River watershed and has substantial water resources. The Oklahoma Water Resources Board (OWRB) estimates that only 1.87 million acre feet per year of stream water is currently used in Oklahoma (OWRB, *Oklahoma Comprehensive Water Plan Update* at 64 (2011)); another 34 million acre feet of unused water flows out of Oklahoma annually, bound for the Gulf of Mexico. CA App. 112-113, 367-368, 805-806. In the southeast part of Oklahoma alone, more than twelve times the volume of water that Tarrant currently seeks for its immediate use is wasted by discharge to the Gulf of Mexico each year. *Id.* at 90. The OWRB has itself stated that "the average annual flow of the six major river basins in southeastern Oklahoma is 6,363,628 acre-feet" (*Status Report to the Office of the Governor* (2002), Compl. Ex. 5 at 27), enough to supply the entire State of Oklahoma three times over. *Ibid.*

B. The Red River Compact

Tarrant is seeking the water it needs under the Red River Compact, one of more than 30 interstate agreements that address allocation and use of water across state borders. See National Center for Interstate Compacts, http://tinyurl.com/bvvmqbc. The Red River is the second largest river basin in the southern Great Plains, marking the southern border of Oklahoma before flowing through Arkansas and Louisiana and into the Gulf of Mexico. The Red River Compact is an interstate agreement among those States and Texas, which, when approved by Congress in 1980, assumed the status of federal law. Pub. L. No. 96-564, 94 Stat. 3305 (1980). See generally *Texas* v. *New Mexico*, 462 U.S. 554, 564 (1983). It is intended to "provide an equitable apportionment among the Signatory States of the water of the Red River and its tributaries" (Compact § 1.01(b)) "by ascertaining and identifying each State's share in the interstate water of the Red River Basin and the apportionment thereof" (*id.* § 1.01(e)).

The Compact divides the Red River Basin into five "reaches," and those reaches into subbasins. As relevant here, the Compact apportions water in reach II, subbasin 5 (Compact § 5.05) and reach I, subbasin 2 (*id.* § 4.02) among the signatory States. The Red River itself does not flow into or through Texas in reach II, subbasin 5, but does flow through the other three signatory States.

As to reach II, subbasin 5, the Compact allocates to the signatory States "equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more, provided that

no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second." Compact § 5.05(b)(1). The signatories are allocated different shares when the Red River's flow is lower than 3,000 cubic feet per second. *Id.* §§ 5.05(b)(2)-(3), (c); cf. *Montana* v. *Wyoming*, 131 S. Ct. 1765, 1770, 1779 (2011) (citing other compacts that "unambiguously apportio[n]" and thereby "guarantee" a "set quantity" of available water "by percentage").

The Compact uses different terms in addressing reach I, subbasin 2, allocating to Oklahoma "free and unrestricted use" of that water. Compact § 4.02(b).

General provisions of the Compact explain how the signatory States are permitted to use the water allocated to them. Section 2.01 provides that "[e]ach signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state" and that "[e]ach state may freely administer water rights and uses in accordance with the laws of that state"; it makes clear, however, that "such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact." And, using language that appears in almost every interstate water compact, Section 2.10(a) provides that "[n]othing in this Compact shall be deemed" to "interfere with or impair the right" of "any Signatory State to regulate within its boundaries the appropriation, use, and control of water"—provided, however, that the State's exercise of that right is "not inconsistent with its obligations under this Compact." *Id.* § 2.10(a).

Nothing in the Compact declares expressly that any signatory State's regulation of water is free from the limitations imposed by the dormant Commerce Clause.

C. Oklahoma's water export embargo

Notwithstanding the Compact, Oklahoma has established a water permitting scheme that operates as an absolute embargo on the export of water from the State for out-of-state use.

The scheme requires that anyone "intending to acquire the right to the beneficial use of any water" located in Oklahoma, including any "state or federal governmental agency, or subdivision thereof," apply to OWRB "for a permit to appropriate." Okla. Stat. tit. 82, § 105.9. In acting on permit applications, OWRB is statutorily required to "effectuat[e]" the express public policy of Oklahoma that "[w]ater use within Oklahoma should be developed to the maximum extent feasible for the benefit of Oklahoma so that out-of-state downstream users will not acquire vested rights therein to the detriment of the citizens of this state." Okla. Stat. tit. 82, §§ 1086.1(A)-(3), 1086.2.

Between 2004 and 2009 Oklahoma enforced this policy through an express moratorium on the export of water from the State. Following expiration of the moratorium in 2009 (see Okla. Stat. tit. 82, § 1B (2009 Supp.); Okla. Stat. tit. 74, § 1221.A (2009 Supp.)), Oklahoma now achieves the same result by imposing highly restrictive requirements that expressly discriminate against out-of-state consumers of water and that, in practical effect, continue to preclude the issuance of water-use permits to out-of-state users. The particular provisions challenged by Tarrant in this suit include:

- Allowing long-term water appropriations only upon a showing that the proposed use "will promote the optimal beneficial use of water in [Oklahoma]," effectively preventing any out-of-state uses that have the lengthy planning periods necessary for municipal water supply. Okla. Stat. tit. 82, § 105.16(B).[2]
- Prohibiting OWRB from making any contract "conveying the title or use of any waters of" Oklahoma "for sale or use in any other state unless such contract be specifically authorized by an act of the Oklahoma Legislature and thereafter as approved by it." *Id.* § 1085.2(2); see also *id.* § 1324.10(B).
- Requiring OWRB, when an "application is for use of water out of state," to evaluate whether that water "could feasibly be transported to alleviate water shortages in the State of Oklahoma." *Id.* § 105.12(A)(5).
- Requiring OWRB regularly to revisit existing permits authorizing water use outside Oklahoma and empowering it to impose additional conditions. *Id.* § 105.12(F).
- Imposing special considerations with regard to Oklahoma's compact obligations that apply solely when a permit application is "to use wa-

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[2] Enormous investments are required for water projects on the scale Tarrant proposes. Oklahoma's water embargo stands as a major deterrent to out-of-state users even applying for a permit, given the substantial resources required to evaluate particularized transactions and the feasibility of the infrastructure (*e.g.*, reservoirs and pipelines) necessary to support them.

ter outside the boundaries of the State." *Id.* § 105.12A(B).

- Requiring that legislative approval be obtained for out-of-state use of water apportioned to Oklahoma by compact, without regard to whether Oklahoma is using that water. *Id.* § 105.12A(D).[3]
- Mandating that the Oklahoma Water Conservation Storage Commission "not permit the sale or resale of any water for use outside the State of Oklahoma." *Id.* § 1085.22.

There is no dispute that the practical upshot of Oklahoma's restrictive permitting scheme is categorically to prevent out-of-state applicants from obtaining a license to receive water located in Oklahoma for out-of-state use. Thus, OWRB's executive director has acknowledged that Oklahoma's permitting laws, which were intended to "protect Oklahoma's water supply" against "out-of state-water sales," "give[] Oklahoma much greater security" than even the pre-2009 moratorium and "actually strengthen[]" its protectionist scheme by requiring legislative approval for any such permits. *New Bill Protects Oklahoma Water Rights*, 2009-2 Oklahoma Water News 4, available at http://tinyurl.com/cxpotnv. See also Janice Francis-Smith, *Senator proposes legislation to make it harder to buy state's water*, The Journal Record (May 14, 2009), available at http://tinyurl.com/7vogg4z (the permitting scheme "makes Okla-

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[3] Despite the Compact's apportionment to Texas of an equal share of the water in reach II, subbasin 5, Oklahoma argues that all water located in the State belongs to Oklahoma for its exclusive in-state use. Appellee CA Br., at 31.

homa's water supply even more secure" than the prior moratorium).

D. Tarrant's efforts to obtain water from Oklahoma

At issue in this case are Tarrant's futile efforts to obtain water allocated to Texas by Section 5.05 of the Compact, as well as other water over which Oklahoma has free and unrestricted use under Section 4.02.

As required by Oklahoma law, Tarrant filed an application with OWRB for a permit to appropriate surface water from the Kiamichi River, within reach II, subbasin 5 in southern Oklahoma. App., *infra*, 55a; CA App. 805-806, 811. This application sought approximately 310,000 acre feet of water per year—well below Texas's allocation from subbasin 5 in the Compact. Tarrant sought to appropriate this water in Oklahoma because Texas does not have access to its full apportionment of subbasin 5 water from within its borders. CA App. 90, 805, 1181.

Tarrant simultaneously filed with OWRB two applications for permits to appropriate surface water in southern Oklahoma within reach I, subbasin 2. Section 4.02(b) of the Compact gives Oklahoma free and unrestricted use of waters in that subbasin. App., *infra*, 55a-56a.

By stipulation of the parties, OWRB will take no official action on any of Tarrant's permit applications until this litigation is concluded. But OWRB has made clear its intention to deny the applications, as it is required to do by state law. In fact, a number of Oklahoma's restrictive permitting regulations were enacted in connection with this very lawsuit, specifically to prevent Tarrant from obtaining Oklahoma water. See Compl. ¶ 23; App., *infra*, 9a-10a.

E. The decisions below

1. At the same time that Tarrant filed applications with OWRB, it sued the members of OWRB alleging that (1) Oklahoma's water embargo laws violate the dormant Commerce Clause by unduly restricting interstate commerce in water, and (2) the Red River Compact preempts the Oklahoma statutes that prevent Tarrant's appropriation of water from subbasin 5. Tarrant sought a declaratory judgment to that effect and an injunction prohibiting OWRB from enforcing the statutes.

The district court in Oklahoma granted summary judgment to OWRB on both claims. First addressing the dormant Commerce Clause, the court focused not only on the "the language of the [Compact]," but also on its "nature" and "purpose." App., *infra*, 66a-67a. Although acknowledging that "[t]he language of the RRC does not explicitly say 'states can limit or stop the out-of-state shipment of water' nor does it make any explicit reference to the Commerce Clause," the court concluded that "the essence" of the Compact "is inherently inconsistent with the standards that would *otherwise* apply based on dormant Commerce Clause analysis." *Ibid.* Because, in the district court's view, "the superseding effect" of the Compact was to give "residents of one state a preferred right of access, over out-of-state consumers, to natural resources located within its borders," Congress's approval of the Compact "*necessarily* constituted its consent to a legal scheme different from that which would otherwise survive Commerce Clause scrutiny." *Id.* at 67a-68a.

The district court also rejected Tarrant's Supremacy Clause challenge. It reasoned that "there is no necessary conflict between the [Compact] and the

state laws plaintiff challenges" because the Compact "explicitly states it is not intended to supplant any state legislation if it is otherwise consistent with the compact." App. *infra*, 70a (citing Compact § 2.10(a)).[4]

2. The Tenth Circuit affirmed. In addressing the dormant Commerce Clause issue, the court recognized that the "standard for determining Congress's intent to consent to state statutes" that otherwise would violate the Clause is the rigorous standard set out in *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), and *South-Central Timber* v. *Wunnicke*, 467 U.S. 82 (1984), which requires that congressional consent be "expressly stated" or otherwise "unmistakably clear." App. *infra*, 19a-20a. But the court of appeals held that "the broad language" of the Compact provides the necessary "clear statement of congressional authorization of state regulation." *Id.* at 24a.

The court reasoned that "the Compact provisions using words and phrases such as 'unrestricted use,' 'control,' 'in any manner,' 'freely administer,' and 'nothing shall be deemed to interfere' give the Oklahoma Legislature wide latitude to regulate interstate commerce in its state's apportioned water." App., *infra*, 27a. Relying in part on the Compact's "Interpretive Comments"—which "the Compact's Negotiating Committee wrote" so "future readers might be apprised of the intent" of the drafting committee (*id.* at

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[4] Tarrant subsequently entered into agreements with property owners to obtain water from Oklahoma that is not subject to the Compact, and amended its complaint to assert a Commerce Clause challenge based on those transactions. The district court dismissed these claims on standing and ripeness grounds, and the Tenth Circuit affirmed. App. *infra*, 45a-51a, 75a-83a. Tarrant does not seek review as to those claims.

4a)—the court determined that these scattered provisions, "[t]aken together," satisfy the clear statement standard of *Sporhase* and *Wunnicke*. *Id.* at 24a-25a, 27a-28a.

The court of appeals also rejected Tarrant's Supremacy Clause claim that the Compact preempts Oklahoma laws that prevent Tarrant from appropriating water allocated to it from reach II, subbasin 5. The court acknowledged that state powers may not be exercised in a manner inconsistent with the terms of the Compact. But it believed that the "equal rights to the use of" water in subbasin 5 guaranteed by Section 5.05(b)(1) of the Compact, when read in the context of the minimum flow provisions that appear elsewhere in Section 5.05, merely ensures that "an equitable share of water from the subbasin reaches the states downstream from Oklahoma and Texas." App., *infra*, 36a-39a. Once minimum downstream flow requirements are met, according to the court, Section 5.05 does not entitle a "Texas user" to "take Texas's share of that water from a tributary located in Oklahoma," even though Texas's share is not available to it from within Texas. *Id.* at 40a. In reaching this conclusion, the court was influenced by the presumption against preemption, which it deemed "particularly strong in this case." *Id.* at 34a-36a. Having read the Compact in this way, the court held that it does not conflict with Oklahoma law.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit held that the Compact displaces Commerce Clause limitations on the regulation of water, thus authorizing Oklahoma to discriminate against other States (including Compact signatories) in a manner that otherwise would be unconstitutional. The importance of that ruling cannot

be overstated. It denies an essential resource to millions of north Texas residents; calls into question the meaning of the many other compacts that are written in similar terms; and permits the sort of economic protectionism that will encourage retaliation and is fomenting significant tension between Texas and Oklahoma. In these circumstances, intervention by this Court is warranted.

I. The Tenth Circuit's Commerce Clause Holding Departs From This Court's Precedents And Fosters Economic Protectionism.

The Tenth Circuit premised its Commerce Clause holding exclusively on the proposition that Congress, by approving the Compact, authorized Oklahoma to discriminate against interstate commerce in a manner that otherwise would be unconstitutional.[5] That ruling should not survive. This Court has held repeatedly that only wholly unambiguous congressional language is sufficient to authorize state interference with interstate commerce. Other courts of appeals have applied this rule faithfully, striking down protectionist state laws in circumstances closely analogous to those here. The decision below, which upheld discriminatory state legislation in reliance on boilerplate Compact language that does not advert to the restriction of interstate commerce *at all*, misun-

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[5] The court of appeals therefore found it unnecessary to decide whether Oklahoma's statutory scheme would be consistent with the Commerce Clause *absent* congressional authorization. App., *infra*, 28a. But the discrimination against out-of-state users is patent: Oklahoma does not permit out-of-state users to access water in the State, even when (as in this case) the water has been allocated to them.

derstands the import of, and cannot be reconciled with, this authority.

A. The Tenth Circuit's Commerce Clause ruling flatly contradicts the "clear statement rule."

1. Before an act of Congress may be interpreted as "alter[ing] the 'usual constitutional balance between the States and the Federal Government,'" it is "incumbent upon the federal courts to be certain" that Congress's intent to "'override[]' this balance" is "unmistakably clear in the language of the statute." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) and *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985)). This "clear statement rule" applies fully with respect to the negative implications of the Commerce Clause.

The Court has held consistently that "Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve" violation of the Commerce Clause. *Wyoming* v. *Oklahoma*, 502 U.S. 437, 458 (1992). "Congress' intent and policy to sustain state legislation from attack under the Commerce Clause [ordinarily is] expressly stated." *Sporhase*, 458 U.S. at 960. Although this Court has not required use of any "talismanic" form of words, it has insisted that, "for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be *unmistakably clear*." *Wunnicke*, 467 U.S. at 91 (emphasis added). It follows that, when Congress has not expressly stated its intent "to sustain state legislation from attack under the Commerce Clause, [courts] have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had

in mind.'" *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982) (citing *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427, 431 (1946)). The Court has stated this requirement in the most forceful possible terms.[6]

The reason for this rule is plain: "The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying [the] dormant Commerce Clause doctrine" itself; it is not "merely a wooden formalism." *Wunnicke*, 467 U.S. at 91-92. As the Court has explained:

> Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. * * * On the other hand, when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others. * * * *A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly*

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[6] See, *e.g.*, *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 408 (1994) (O'Connor, J., concurring in the judgment) ("Congress must be 'unmistakably clear' before we will conclude that it intended to permit state regulation which would otherwise violate the dormant Commerce Clause"); *Wyoming*, 502 U.S. at 458 (a State has the "burden of demonstrating a clear and unambiguous intent on behalf of Congress to permit the discrimination against interstate commerce"); *Maine* v. *Taylor*, 477 U.S. 131, 139 (1986) ("An unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state legislation" to be "exempt[] from Commerce Clause scrutiny").

> *the risk that unrepresented interests will be adversely affected by restraints on commerce.*

Id. at 91-92 (emphasis added). See also *Maine* v. *Taylor*, 477 U.S. 131, 139 (1986). The Court has insisted on the same degree of clarity in other areas of the law where the nature of the interests at stake make it essential to have confidence that Congress intended a particular result.[7]

2. The Court's decision in *Sporhase* illustrates the application of this clear statement rule in a factual setting strikingly similar to the one here. *Sporhase* involved a Commerce Clause challenge to "a Nebraska statutory restriction on the withdrawal of ground water" that was analytically indistinguishable from the restriction on surface water at issue here: it prohibited, without a proper permit, the extraction of water from the ground for purposes of transporting the water across state lines for use in another State. 458 U.S. at 943-944. As a practical matter, the permitting scheme functioned as an embargo on the net exportation of ground water from Nebraska. *Id.* at 957 (the statute "operates as an explicit barrier to commerce between" Nebraska and its adjoining States).

In arguing that its water embargo survived dormant Commerce Clause scrutiny, Nebraska pointed

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[7] See, *e.g.*, *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989) (congressional intent to abrogate state sovereign immunity must be "unmistakably clear in the language of the statute"); *Lane* v. *Pena*, 518 U.S. 187, 192 (1996) (congressional intent to waive federal sovereign immunity must be "unequivocally expressed"); *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 952 (1997) (with respect to retroactivity, there must be "a clear statutory expression of congressional intent").

to dozens of broadly applicable federal water statutes and "a number of interstate compacts dealing with water that have been approved by Congress," which it believed to show that Congress "authorized the States to impose otherwise impermissible burdens on interstate commerce in ground water." 458 U.S. at 958. "[T]ypical" of the statutes that Nebraska relied upon was the federal Reclamation Act of 1902, Pub. L. 161, 32 Stat. 390, which establishes funding for irrigation across the western States, including Nebraska. That statute provided that "[n]othing in this Act shall be construed" to "in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation." *Sporhase*, 458 U.S. at 959 (quoting 43 U.S.C. § 383).

This Court squarely rejected Nebraska's argument that such broad statutory language represented authorization "to impose otherwise impermissible burdens on interstate commerce in ground water." *Sporhase*, 458 U.S. at 958. Thus, "[a]lthough the 37 statutes and the interstate compacts demonstrate Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional constraints on such state laws." *Id.* at 959-960. To the contrary, "[t]he negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred." *Id.* at 960. The cited statutes and interstate compacts accordingly did not "constitute[] persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce" and "do not indicate that Congress wished to remove federal constitutional constraints on such state laws." *Id.* at 959-960.

3. Although the Tenth Circuit cited *Sporhase* and *Wunnicke* in passing (App., *infra*, 19a-20a, 27a-28a), it misunderstood this Court's clear statement rule in a number of key respects.

First, the Compact language relied upon by the court of appeals does not remotely speak with the clarity necessary to signify a congressional intent to displace the negative Commerce Clause. Certain of that language—that "'[n]othing in this Compact shall be deemed" to "interfere within [a State's] boundaries [with] the appropriation, use, and control of water'" (App., *infra*, 25a)—is virtually identical to language that this Court held in *Sporhase* and *New England Power* to be *insufficient* to allow state discrimination against interstate commerce. See *Sporhase*, 458 U.S. at 958; *New England Power*, 455 U.S. at 341.[8] Such language may disclaim federal statutory preemption (a disclaimer that, as we discuss below, is itself limited in this case by the Compact), but it says nothing to show "that Congress affirmatively contemplate[d] otherwise invalid state legislation" or that there was, "in fact," a "collective [congressional] decision" to override constitutional requirements. *Wunnicke*, 467 U.S. at 91-92. Were the Tenth Circuit's contrary view correct, myriad federal statutes

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[8] In the court of appeals' view, "*Sporhase* is distinguishable because in that case Nebraska was attempting to regulate the interstate transfer of groundwater that was not subject to an interstate compact," whereas "[i]n this case, the water is subject to the Red River Compact." App., *infra*, 23a. But the court offered no explanation why that observation has any bearing on whether Congress, in approving the Compact, expressed a clear intent to displace the dormant Commerce Clause.

effectively would nullify the dormant Commerce Clause.[9]

Second, the Tenth Circuit found support for Oklahoma's discriminatory restrictions in Compact language that it read to indicate a policy conferring "broad regulatory authority" on the signatory States over apportioned water. App., *infra*, 25a, 27a. But this is precisely the kind of gestalt approach that this Court's precedent forbids. As the Court explained in *Wunnicke*, "[t]he fact that the state policy in this case appears to be consistent with federal policy—or even that state policy furthers the goals we might believe that Congress had in mind—is an insufficient indicium of congressional intent." 467 U.S. at 92. Indeed, as the Fifth Circuit has put it, reliance on policies and "purposes" rather than "express language" necessarily "indicates that Congress has" *not* expressed

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[9] The remaining language cited by the Tenth Circuit is equally deficient. Much of that language applies only to reach I, subbasin 2. As to that, the Compact indicates that the signatory States may use the water allocated to them "in any manner" and "freely administer water rights and uses in accordance with the laws of that state" (App., *infra*, 24a), and that Oklahoma shall have "free and unrestricted use of the water" (*id.* at 26a). This may give Oklahoma use of reach I, subbasin 2 water, but does not suggest (let alone indicate with unmistakable clarity) that it overrides the Commerce Clause regarding water within Oklahoma that is allocated to *other* States in *another* subbasin. As for the Compact language specifically addressing reach II, subbasin 5, the Tenth Circuit opined that the matter was "more complex," but nevertheless concluded that Section 5.05 "confers authority to the states to regulate water use within their respective boundaries." *Id.* at 26a-27a. But the court pointed to no language in this provision giving exclusionary authority over *all* water in Oklahoma sufficient to lift Commerce Clause requirements.

consent in unmistakably clear terms. *Piazza's Seafood World, LLC* v. *Odom*, 448 F.3d 744, 751 (5th Cir. 2006). Instead, as the Third Circuit has said, displacement of the dormant Commerce Clause must be "clearly and affirmatively contemplated by Congress, and expressly authorized in the statutory language." *Tri-M Group, LLC* v. *Sharp*, 638 F.3d 406, 431 (3d Cir. 2011). The Tenth Circuit's decision here cannot be squared with these cases. A compact may assure a State the right to make use of its own water as it wishes, but such assurance, standing alone, does not entitle that State to discriminate against other States or embargo other States' water.[10]

Third, the Tenth Circuit recognized that certain of the Compact's language "might suggest no more than preservation of existing state laws without protecting them from dormant Commerce Clause attack." App., *infra*, 25a. That, of itself, should have been an end to the matter: language susceptible to more than one interpretation cannot be "unmistakably clear." But the court went on to find that the Compact's Interpretive Comments—that is, its legislative history—"refute this suggestion." *Ibid.* That is so, the court reasoned, because the comments declare that "each state is free to continue its existing internal water administration, or modify it in any manner it deems appropriate"; some of the discriminatory Oklahoma statutes "predate the signing and ratification of the Compact and would have been familiar to the Compact's drafters"; and "[a]ccordingly, when

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[10] Compact provisions like Section 2.10 allow a state to administer water rights within its borders as long as the state meets its obligations to other states under a compact. See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102-106 (1938).

Congress ratified the Compact and granted to each state the power to 'freely administer' the water, it gave congressional consent to the pre-Moratorium statutes at issue here." *Id.* at 25a-26a.

But that analysis is wrong on its own terms: even assuming (improbably) that Congress had been aware of the Interpretive Comments' statement that each signatory State could continue its existing water administration, it would have regarded "[t]he negative implications of the Commerce Clause" to be "ingredients of the *valid* state law to which [it] has deferred." *Sporhase*, 458 U.S. at 960.

And the Tenth Circuit's analysis suffers from a more fundamental defect: although the court of appeals found recourse to the legislative history necessary to confirm its reading of the Compact, this Court has rejected *any* reliance on legislative history to satisfy a clear statement rule. Thus, in other clear-statement-rule contexts such as Eleventh Amendment immunity, the Court has held that "[l]egislative history generally will be irrelevant" to evaluating the clarity of Congress's statement: "If Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the [clear statement] rule" will "not be met." *Dellmuth*, 491 U.S. at 230. See also, *e.g.*, *Hoffman* v. *Connecticut Dept. of Income Maintenance*, 492 U.S. 96, 104 (1989) (plurality opinion) (substantially the same); *Hilton* v. *S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 204 (1991) ("[T]he Court will not look to legislative history in making its inquiry").

The Court similarly has eschewed recourse to legislative history when applying the clear statement rule used to determine whether Congress waived the United States' sovereign immunity: "A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text; 'the unequivocal expression of elimination of sovereign immunity that we insist upon is an expression in statutory text.'" *Lane*, 518 U.S. at 192 (quoting *United States* v. *Nordic Vill.*, 503 U.S. 30, 37 (1992)).

The same rule must apply here: "[I]solated references" in the legislative history "do not satisfy [the Court's] requirement of an explicit statutory authorization" to depart from the dormant Commerce Clause. *C&A Carbone*, 511 U.S. at 410 (O'Connor, J., concurring) (citing *Dellmuth* and *Nordic Village*).

The necessity of this rule is apparent. In the best of circumstances, reliance on "isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards, and 'a step to be taken cautiously.'" *New England Power*, 455 U.S. at 342. Dependence on such easily manipulable evidence is wholly inappropriate in the Commerce Clause setting, where it is essential that Congress *actually* consider the issue and act *affirmatively* before individual states are permitted to restrain interstate commerce. And such reliance is doubly misplaced in this case, where the Tenth Circuit assumed Congress considered *state* legislative history.

Following this Court's lead, the Fourth Circuit has rejected an argument very similar to the one accepted by the Tenth Circuit here. In *Waste Management Holdings* v. *Gilmore*, 252 F.3d 316 (4th Cir. 2001), the defendants argued that abrogation of the Commerce Clause was supported by legislative histo-

ry suggesting that Congress was aware of, and authorized, discriminatory state laws. The Fourth Circuit gave that argument short shrift, holding that the cobbling together of "fragments of statutory language and legislative history" falls "far short of the demanding standard that congressional intent be unmistakably clear." *Id.* at 347. The Tenth Circuit should have reached the same conclusion here.[11]

B. Proper resolution of the Commerce Clause question is a matter of immense importance.

Correction of the Tenth Circuit's error is a matter of great practical and doctrinal importance. Most immediately, the holding below will have dire consequences for water providers in Texas. Given current drought conditions (2011 ranks as the driest year on record in the State), Tarrant's reservoir storage has declined to less than 70%, substantially below the 75% emergency level that triggers mandatory water use restrictions. Tarrant must take immediate action to address both this concern and its longer term need for water. Enormous investments of time and money are required for water acquisition and transfer projects of the scale needed by Tarrant, including planning for and construction of new infrastructure

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[11] Consistent with the Tenth Circuit's approach below, the First Circuit has approved reliance on "legislative history" and reference to the "design of the statute as a whole" as a basis for inferring "unmistakably clear" Congressional consent to displace the dormant Commerce Clause. *N.Y. State Dairy Foods, Inc.* v. *Ne. Dairy Compact Comm'n*, 198 F.3d 1, 9 (1st Cir. 1999). The Ninth Circuit likewise has approved reliance on "legislative history" to "glean[]" the "requisite intent." *Shamrock Farms Co.* v. *Veneman*, 146 F.3d 1177, 1180 (9th Cir. 1998). The extent of this confusion confirms the need for this Court's intervention.

like reservoirs and pipelines. CA App. 126. The lower court's error will thwart this process irreparably and defeat over twenty years of state water planning, which relied upon the expectation that Texas would be able to access and use all of the water apportioned to it from reach II, subbasin 5.

This impact on the millions of people who rely on Tarrant to supply potable water is illustrative of the broader implications of the decision below. Almost every major water source in the West is governed by an interstate compact, and almost every one of those compacts contains the same boilerplate language that the Tenth Circuit found to insulate the Red River Compact from Commerce Clause scrutiny.[12] Thus, on the Tenth Circuit's reasoning, Congress has authorized virtually every State west of the Mississippi to enact protectionist water laws that are likely to upend carefully balanced arrangements governing the management of western waterways.

That result is deeply troubling, for obvious reasons. To begin with, a reliable, long-term water sup-

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[12] See Alabama-Coosa-Tallapoosa River Basin Compact of 2002, art. X(d) & XVI; Apalachicola-Chattahoochee-Flint River Basin Compact of 1997, art. X(d) & XVI; Arkansas River Basin Compact of 1970, art. XI(b); Arkansas River Compact of 1949, art. VI(a)(2); Arkansas River Compact of 1965, art. XIII(b); Big Blue River Compact of 1971, art. VII, § 7.2(3); Canadian River Compact of 1950, art. X(d); Colorado River Compact of 1922, art. IV(c); Delaware River Basin Compact of 1961, art. 14.19; Great Lakes–St. Lawrence River Basin Water Resources Compact of 2005, art. 8.2; Pecos River Compact of 1949, art. VIII; Republican River Compact of 1943, art. VII; Sabine River Compact of 1951, art. II; Snake River Compact of 1943, art. IX; Susquehanna River Basin Compact of 1968, art. 15.19; Upper Colorado River Basin Compact of 1948, art. XV(b).

ply is essential to supporting population and economic growth. Yet the West's water supply, including in the area served by Tarrant, is under great strain: "[T]he severe prolonged drought that began in 2000, coupled with demands associated with increasing population and economic growth over several decades," has placed unprecedented stress on local municipalities' water management plans, bringing regional "reservoirs to historic low levels." Balaji Rajagopalan, et al., *Water supply risk on the Colorado River: Can management mitigate?*, 45 Water Resources Res. W08201, at 1 (2009).

This strain makes appropriations by arid western States from water-rich neighboring States essential. But by encouraging "the tendencies toward economic Balkanization" that the Commerce Clause was intended to prevent (*Hughes* v. *Oklahoma*, 441 U.S. 322, 325 (1979)), the decision below may make such appropriations effectively impossible. Localities blessed with substantial water reserves now are free, under the Tenth Circuit's rule, to hoard water while their immediate neighbors go dry.[13] Such protectionist measures are especially likely when, as in this case, a "regulation is of such a character that its burden falls principally upon those without the

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[13] That States are certain to hoard water resources is hardly an exaggeration. One local "beneficial use" that Oklahoma officials have said they will invoke to keep Tarrant from appropriating any of Oklahoma's water in this case is "conservation"—which is to say, no use at all. See Bryan Smith, *OK Water Resources Board not yielding to Texas on water rights*, eCapitol News (May 14, 2008) ("In a subtle nod to the lawsuit, [OWRB's executive director] said not to expect the board's [water planning] efforts to reveal 'excess water,' as all resources are needed, if not for consumption then recreation and conservation").

state"; in such circumstances, legislative action is not likely to be subjected to those political restraints "which are normally exerted on legislation where it affects adversely some interests within the state." *Wunnicke*, 467 U.S. at 92.

The Tenth Circuit's departure from the approach mandated by this Court and followed by the Third, Fourth, and Fifth Circuits therefore creates confusion about the constitutionality of these protectionist schemes, casts uncertainty on water management plans throughout the Nation, encourages protectionist legislation that will impede interstate commerce, and foments interstate tension. This Court's immediate intervention is urgently needed.

II. Oklahoma's Refusal To Allow Texas To Obtain The Water It Is Allocated By The Compact Is Preempted By The Compact's Plain Terms.

Oklahoma's refusal to allow the appropriation of water by Texas from reach II, subbasin 5 also is preempted by the Compact's plain terms. The Compact provides expressly that the signatory States have "equal rights to the use of" that water (Compact § 5.05(b)(1)); this language cannot plausibly be read, as the Tenth Circuit did, to allow Oklahoma to bar Texas from using its full allocated share. And the Tenth Circuit compounded its error by upholding Oklahoma's discriminatory legislation in reliance on the general presumption against preemption—a presumption that rightfully applies when Congress *unilaterally* imposes a rule on the States, but is entirely out of place with respect to interstate compacts that the States freely negotiate among themselves. Because these errors involve the meaning of an agreement among States on a recurring matter of great

importance—and because "the meaning of a compact is a question over which this Court has the final say" (*Petty* v. *Tenn.-Mo. Bridge Commission*, 359 U.S. 275, 278 (1959))—further review is warranted.

A. The Tenth Circuit's preemption analysis rests on an incorrect interpretation of the Compact.

At the outset, the Tenth Circuit's analysis of the preemptive effect of the Compact is fundamentally flawed. The court recognized that the law of a signatory State is preempted to the extent that it is inconsistent with the Compact's terms. App., *infra*, 33a. See, *e.g.*, *Del. River Joint Toll Bridge Comm'n* v. *Colburn*, 310 U.S. 419, 433-434 (1940) (interstate compact superseded inconsistent state law); *Hinderlider*, 304 U.S. at 106 (apportionment by compact is binding on signatory states and overrides inconsistent state grant of water rights). In nevertheless concluding that the Compact does not preempt Oklahoma's embargo, the court misread the Compact's text in a manner that departed from its plain terms and distorted the intent of the signatory States.

1. The Tenth Circuit read Compact Section 2.01 as a grant of "broad discretion to states to regulate the use of their water apportionments." App., *infra*, 35a. As a consequence of this broad grant, the court concluded, Oklahoma's protectionist statutes are not preempted. But Section 2.01 contains a significant condition, making the free administration of water rights by States "subject to the availability of water in accordance with the apportionments made by this Compact." And the Compact expressly apportions to each signatory State "*equal rights* to the use of" the water in reach II, subbasin 5, with no State "entitled to more than 25 percent of the water in excess." *Id.*

§ 5.05(b)(1) (emphasis added).[14] This provision thus declares, in so many words, that Texas has a *right* to the water that Tarrant (on behalf of that State) claims in this case. Oklahoma's discretion to regulate its apportionment thus cannot be understood as discretion to restrict *other* States' apportionments.

Likewise, the Tenth Circuit read Section 2.10 to "caution against reading preemption into the Compact's other provisions." App., *infra*, 35a. But Section 2.10 provides only that nothing in the Compact shall be deemed to "interfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water *not inconsistent with its obligations under this Compact.*" (Emphasis added). Thus, by its plain terms, Section 2.10 *does* supplant any state law that is inconsistent with the Compact. As one leading authority put it, "[m]any compacts state that nothing in the compact shall impair the right of a signatory state to regulate water use inside its borders 'not inconsistent with' its obligations under the compact. The clear implication is that state laws inconsistent with the compact must give way." Douglas L. Grant, *Interstate Water Allocation*, in Waters and Water Rights, at § 46.04 (Robert E. Beck ed.) (3d ed. 2009).

2. In upholding Oklahoma's discriminatory laws despite the Compact's equal allocation of subbasin 5 waters, the Tenth Circuit reasoned that the "equal rights" language of Section 5.05(b)(1) was intended

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[14] These allocations apply when the flow is at least 3000 cubic feet per second, which is usually the case. See Compact Interpretive Comments, CA App. 435 ("Flows less than 3000cfs have occurred only 4.2% of the time").

only to "ensure that an equitable share of water from the subbasin reaches the states downstream from Oklahoma and Texas" at times when the Red River has an unusually low flow. App., *infra*, 36a; see also *id.* at 37a-39a, 42a-43a. But that is not what the Compact says.

The Compact provides that "[t]he Signatory States shall have equal rights to the use of" of subbasin 5 water (Compact § 5.05(b)(1)); Texas is one of the signatory States; it therefore is entitled to use of the water at issue here. In reaching the contrary conclusion, the Tenth Circuit opined that the words "'[e]qual rights to the use of' can reasonably be read to mean that each signatory state has the same opportunity and entitlement to use up to 25 percent of the *excess water in its state and under its state laws*." App., *infra*, 42a-43a (emphasis added). But the Compact cannot be read to say any such thing: "equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5" (Compact § 5.05(b)(1)) simply does not mean "entitlement to use up to 25 percent of the excess water *in its state*"—particularly because subbasin 5 is a geographic area not defined by state lines and Texas has limited ability to take its water in subbasin 5 from within Texas.[15]

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[15] The Tenth Circuit assumed the truth of Tarrant's observations that "the part of Texas located within Reach II, Subbasin 5" yields "a small fraction of the total water" in that subbasin and that "Texas must divert some water in Oklahoma for Texas to secure its equal share." App., *infra*, 41a. The court nevertheless "h[e]ld that § 5.05(b)(1) does not allocate water located in Oklahoma to Texas regardless of what amount of water Tarrant * * * can appropriate in Texas." *Id.* at 44a n.3.

The Tenth Circuit inferred a critical restriction not expressed in the Compact: that Texas is not allowed to access its equal apportionment throughout subbasin 5 (including from the Red River itself), and instead is limited to subbasin 5 water within Texas. But compacts should be read according to their "plain terms." *Montana*, 131 S. Ct. at 1779. Here, the Tenth Circuit's reading "does not follow from the text and would drastically redefine" Section 5.05(b)'s meaning (*id.* at 1778), making Texas the only signatory State not able to obtain its full equal apportionment in reach II, subbasin 5. Had the Compact intended a state-line prohibition, it easily could have said so; instead, it created a subbasin that traverses state lines.

In fact, the "low flow" provisions in Compact Sections 5.05(b)(2) and (3) upon which the Tenth Circuit relied address the rare circumstances when the Red River's flow is below 3000 cubic feet per second at the Arkansas-Louisiana state boundary. During these low flow periods, the Compact requires upstream States to allow a certain quantity of water to flow to Louisiana, and those States may determine individually the best way to provide the necessary deliveries. Compact § 5.05(b)(2), (3). But *Section 5.05(b)(1)*, by its plain terms, is not limited to ensuring particular flows to Louisiana; on the face of it, ensuring *each* State its equal share, and limiting *each* to no "more than 25 percent" of the water in the subbasin, has several quite different and much broader purposes.

First, by providing that the signatory States are to share equally in flows over 3000 cubic feet per second, Section 5.05(b)(1) has the effect of assuring *each* State a specified amount of water and protecting *all* signatories from predatory use by another

State—including protecting Texas against Oklahoma using more than its fair share of the water in subbasin 5.

Second, the Compact is designed to ensure *beneficial use* of water. Compact § 2.01. But if Texas is unable to access its share of subbasin 5 water, that water will go to waste. None of the other compacting States is allowed to use more than its 25 percent share of flow over 3,000 cubic feet per second. As a consequence, no State will be able to use the 25 percent that would have gone to Texas absent Oklahoma's protectionist laws.

Third, nothing in the Compact says that Texas is limited to taking the water to which it is entitled under Section 5.05(b)(1) from within its own borders. To the contrary, the Compact allocates water to Texas from reach II, subbasin 5—not from the *portion* of reach II, subbasin 5 *that is located in Texas*. This phrasing is significant: When the signatory States meant to impose a state-boundary limitation on an allocation, they said so expressly. See Compact § 5.03(b) ("Oklahoma and Arkansas shall have free and unrestricted use of the water of this subbasin *within their respective states*") (emphasis added); *id.* § 6.03(b) ("Texas and Louisiana *within their respective boundaries* shall have unrestricted use of the water of this subbasin") (emphasis added). But they included no such limitation in Section 5.05(b)(1). This omission, of course, is presumed to be "intentional[] and purpose[ful]." *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

B. The presumption against preemption does not apply to interstate compacts.

The Tenth Circuit went astray not only in its construction of the Compact, but also in its interpretive approach. The court found substantial support for its unnatural reading of the Compact's terms in the presumption against preemption, which the court invoked no fewer than four times. App., *infra*, 34a, 40a-43a. In the court's view, this case implicates a "field" of law "in which Congress has legislated," but "which the States have traditionally occupied"; thus, any preemption analysis must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 34a. And the court of appeals thought this presumption to be "particularly strong in this case because history reveals 'the consistent thread of purposeful and continued deference to state water law by Congress.'" *Id.* at 34a-35a.

The error in this analysis is obvious. An interstate compact is not imposed upon the States by Congress; it is, instead, the product of two or more States exercising their sovereign prerogative to negotiate a collaborative solution to a common problem. Finding that congressional approval of such an agreement displaces contrary state laws does not derogate state sovereignty, but honors it. The Tenth Circuit itself noted that the presumption against preemption derives from "respect for the States as independent sovereigns in our federal system" (App., *infra*, 34a (quoting *Wyeth* v. *Levine*, 555 U.S. 555, 565 n.3 (2009)))—and that respect dictates reading compacts according to their plain terms, as written by the States themselves.

Thus the rationale underlying the presumption against preemption—respect for state sovereignty—is simply inapplicable when it comes to the preemptive force of interstate compacts. The Tenth Circuit's trumpeting of the "consistent thread of purposeful and continued deference to state water law by Congress" (App., *infra*, 34a-35a) was, in this way, fundamentally misguided: The source of preemptive authority in this case was an agreement that *itself* reflects the judgment of the signatory States with respect to the proper allocation of Red River waters. This Court has noted that, "[a]s with all contracts," compacts must be interpreted "according to the intent of the parties, here the signatory States." *Montana*, 131 S. Ct. at 1771 n.4. But the Tenth Circuit's presumption will require federal courts to favor one reading of compacts over another, leading to results that are inconsistent with both the plain compact language and the signatory States' intent as reflected in that language. That surely will frustrate States' use of compacts to achieve "sensible compromise." Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustment*, 34 Yale L.J. 685, 706 (1925). For this reason, as well, review of the decision below is warranted.

* * *

This Court has recognized its special role in policing state actions that disadvantage and discriminate against the interests of other States, explaining that "[t]he history of our Commerce Clause jurisprudence has shown that even the smallest scale discrimination can interfere with the project of our federal Union." *Camps Newfound/Owatonna* v. *Town of Harrison*, 520 U.S. 564, 595 (1997). Thus "to coun-

tenance discrimination of the sort that [Oklahoma's] statute[s] represent[] would invite significant inroads on our 'national solidarity.'" *Ibid.*

Here, the discriminatory impact of the Oklahoma regime is clear. Because the decision below declined to remedy that discrimination, leaves the law in a state of confusion, and addresses legal issues that are of immense practical importance, this Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2012

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TARRANT REGIONAL WATER DISTRICT,
a Texas State Agency,
Plaintiff - Appellant
-v.-

RUDOLF JOHN HERRMANN; JESS MARK NICHOLS; FORD DRUMMOND; ED FITE; JACK W. KEELY; KENNETH K. KNOWLES; RICHARD SEVENOAKS, in their official capacities as members of the Oklahoma Water Resources Board ("OWRB") and the Oklahoma Water Conservation Storage Commission; LINDA LAMBERT, in her official capacity; JOSEPH E. TARON, in his official capacity as a member of the Oklahoma Water Resources Board and the Oklahoma Water Conservation Storage Commission,
Defendants - Appellees.

Docket No. 10-6184

Appeal from the United States District Court for the Western District of Oklahoma

(D.C. No. 5:07-CV-00045-HE)

[September 7, 2011]

Before: Murphy, Gorsuch, and Matheson, Circuit Judges

Matheson, Circuit Judge.

I. INTRODUCTION

Tarrant Regional Water District ("Tarrant"), a Texas state agency, applied to the Oklahoma Water Resources Board ("the OWRB") for permits to appropriate water at three locations in Oklahoma for use in Texas. Just before filing its applications, Tarrant sued the nine members of the Oklahoma Water Resources Board (collectively "OWRB") in the district court for the Western District of Oklahoma and sought a declaratory judgment to invalidate certain Oklahoma statutes that govern the appropriation and use of water and an injunction preventing OWRB from enforcing them.[1]

Tarrant alleged that the Oklahoma statutes restrict interstate commerce in water and thereby violate the dormant Commerce Clause as discriminatory or unduly burdensome. Tarrant further alleged that Congress did not authorize Oklahoma through the Red River Compact ("Compact") to enact such laws. OWRB responded that Congress did authorize Oklahoma to adopt these statutes by consenting to the Compact.

Tarrant also claimed that the Compact preempts the Oklahoma statutes insofar as the Compact applies to Tarrant's application to appropriate water located in Reach II, Subbasin 5 of the Red River Basin.

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[1] The members of the OWRB are also ex officio members of the Oklahoma Water Conservation Storage Commission.

The district court granted summary judgment for OWRB on both the dormant Commerce Clause and Supremacy Clause claims. *Tarrant Reg'l Water Dist. v. Herrmann*, No. CIV-07-0045-HE, 2009 WL 3922803 (W.D. Okla. Nov. 18, 2009) (unpublished) (*Tarrant I*).

After that decision, Tarrant took steps to export to Texas Oklahoma water that is not subject to the Compact. Tarrant negotiated a contract with property owners in Stephens County, Oklahoma to export groundwater to Texas and also entered a memorandum of understanding (MOU) with the Apache Tribe concerning the Tribe's potential water rights. Then in the district court Tarrant reasserted its dormant Commerce Clause challenge based on these transactions. The district court dismissed the Stephens County matter for lack of standing and the Apache Tribe matter as not ripe. *Tarrant Reg'l Water Dist. v. Herrmann*, No. CIV-07-0045-HE, 2010 WL 2817220 (W.D. Okla. July 16, 2010) (unpublished) (*Tarrant II*).

This appeal raises three issues. First, did Congress authorize the Compact states to protect their apportionments of water through measures that otherwise might violate the dormant Commerce Clause? Second, did the Compact preempt certain Oklahoma statutes insofar as they interfere with Tarrant's appropriating water located in the Oklahoma part of Reach II, Subbasin 5 and exporting it to Texas? Third, did Tarrant have a justiciable dormant Commerce Clause challenge to the application of certain Oklahoma statutes to water not subject to the Compact based on the Stephens County and Apache Tribe arrangements?

Exercising jurisdiction under 28 U.S.C. § 1291, we AFFIRM the grants of summary judgment on the dormant Commerce Clause and preemption issues. We AFFIRM the dismissals based on standing and ripeness.

I. BACKGROUND

A. Facts

Tarrant Regional Water District is a Texas state agency that provides water to north central Texas. The Dallas-Fort Worth metropolitan area has grown rapidly, with a corresponding need for water. This case represents Tarrant's efforts to satisfy this need with water from Oklahoma.

The Red River forms the boundary between southeastern Oklahoma and northeastern Texas. In 1955, Congress granted permission to Arkansas, Louisiana, Oklahoma, and Texas to negotiate an agreement apportioning water in the Red River Basin. *See* Pub. L. No. 84-346, 69 Stat. 654 (1955). In 1978, the states signed the Red River Compact, and, in 1980, Congress ratified it. *See* Pub. L. No. 96-564, 94 Stat. 3305 (1980). The Compact divides the Basin into five reaches and further divides the reaches into subbasins to allocate water.

To aid in understanding the Compact, the Compact's Negotiating Committee wrote Interpretive Comments so that future readers "might be apprised of the intent of the Compact Negotiating Committee with regard to each Article of the Compact." Aplt. App. Vol. I, 248.

Tarrant seeks to export water to Texas from multiple sources in Oklahoma. Tarrant has proposed to appropriate water from Beaver Creek and Cache

Creek, two Oklahoma tributaries of the Red River. Both creeks are located in Reach I, Subbasin 2. Tarrant also has applied to appropriate water from the Kiamichi River, an Oklahoma tributary of the Red River in a different area—Reach II, Subbasin 5. The Compact applies to the water from these locations.

In an attempt to access water not subject to the Compact, Tarrant has entered into an agreement with owners of groundwater rights in Stephens County, Oklahoma to export groundwater from their property to Texas. Tarrant also has signed an MOU with the Apache Tribe. Under the MOU, the parties agreed to work cooperatively to further quantify the Apache Tribe's reserved water rights and to develop mutually agreed terms for Tarrant's use of certain amounts of such water by purchase or long-term lease.

Oklahoma requires a permit to appropriate water within the state and has created the Oklahoma Water Resources Board to rule on permit applications. *See* OKLA. STAT. tit. 82, § 105.9 (establishing the OWRB's permit application authority). Tarrant has filed permit applications for its Beaver Creek, Cache Creek, and Kiamichi River plans. Oklahoma statutes establish criteria that the OWRB must follow in deciding on applications. Some of these statutes require the OWRB to treat permits for in-state and out-of-state water use differently. *See generally id.* § 105 (cataloguing the criteria for water permit applications).

B. Procedural History

On November 1, 2007, Tarrant sued OWRB in the Western District of Oklahoma. It sought (1) a declaratory judgment that certain Oklahoma sta-

tutes are unconstitutional and (2) an injunction to prevent the OWRB from applying the statutes to its Beaver Creek, Cache Creek, and Kiamichi River applications. Tarrant advanced what it labeled its Commerce Clause and Supremacy Clause arguments. Tarrant argued that the Oklahoma statutes placed burdens on interstate commerce that are unconstitutional under the dormant Commerce Clause. It also asserted that the Oklahoma statutes were preempted insofar as they conflicted with the Compact's language. Tarrant clarified that its Supremacy Clause claim concerns the Compact provision governing Reach II, Subbasin 5. Tarrant argued that this provision entitles Texas to a share of Subbasin 5 water and allows Tarrant as a Texas state agency to divert part of this share from an Oklahoma location in Subbasin 5 and export it to Texas free from the Oklahoma restrictions on out-of-state water use.

1. Tarrant's Initial Complaint and Ensuing Litigation

Tarrant's initial complaint challenged two sets of statutes. The first set was enacted in 2004 and placed a five-year Moratorium on the export of water out of state:

> [T]he Legislature hereby establishes a moratorium on the sale or exportation of surface water and/or groundwater outside this state pursuant to the provisions of this section. Unless otherwise repealed or revoked by the Oklahoma Legislature, the moratorium shall be in effect for a five-year period beginning on the effective date of this act.

OKLA. STAT. tit. 82, § 1B(A). Another statute applied the Moratorium to

> any state or tribal compact or any intergovernmental cooperative agreement, authorized pursuant to law, which is drafted in whole or in part to apportion surface water or groundwater ownership, or authorize or otherwise implement any sale or exportation of surface water or groundwater outside this state, except as authorized by the provisions of this act.

Id. 74, § 1221.A. The Moratorium expired on November 1, 2009.

The second set of challenged statutes was enacted before the Moratorium. These statutes treat applications for in-state and out-of-state water use differently. One statute requires legislative approval for out-of-state water use: "Provided, however, no contract shall be made conveying the title or use of any waters of the State of Oklahoma . . . for sale or use in any other state, unless such contract be specifically authorized by an act of the Oklahoma Legislature and thereafter as approved by it." *Id.* 82, § 1085.2(2). Another provision allows an exception to the general requirement that water be put to beneficial use within one year if the proposal optimized in-state water use:

> If . . . the proposed project, improvement or structure will promote the optimal beneficial use of water in the state, and it further appears that the total amount of water to be authorized by the permit cannot be put to beneficial use within seven (7) years, then the Board shall provide in the permit the time within which the total amount to be authorized shall be put to beneficial use.

Id. § 105.16.

Also in the second set are two statutes that prevent Oklahoma state entities from selling water for out-of-state use. One statute requires that the Oklahoma Water Conservation Storage Commission—which includes all the members of the OWRB—"shall not permit the sale or resale of any water for use outside the State of Oklahoma." *Id.* § 1085.22. Another statute contains a similar limit on water exports by regional water districts: "No district organized hereunder shall sell or export water or gas pursuant to the Rural Water, Sewer, Gas and Solid Waste Management Districts Act outside of the state without consent of the Legislature." *Id.* § 1324.10(B).

Finally, the second set of challenged statutes includes an Oklahoma statutory definition that prevents municipal water districts from including out-of-state agencies. The definition of "public agency" provides that "public agencies of other states shall not be entitled to membership in the district." *Id.* § 1266(9).

OWRB moved to dismiss Tarrant's complaint because the case was not ripe, OWRB was entitled to Eleventh Amendment immunity, the court should decline to hear the case under the abstention doctrine, and Louisiana and Arkansas are indispensable parties. The district court rejected each of OWRB's arguments and denied the motion. *See Tarrant Reg'l Water Dist. v. Herrmann*, No. CIV-07-0045-HE, 2007 WL 3226812 (W.D. Okla. Oct. 29, 2007) (unpublished). OWRB filed an interlocutory appeal on the ripeness, immunity, and abstention rulings. We affirmed the district court's decision on the first two issues and dismissed the portion of the appeal regarding abstention. *Tarrant Reg'l Water Dist. v. Seve-*

noaks, 545 F.3d 906, 915 (10th Cir. 2008) ("*Sevenoaks*").

2. Tarrant's Supplemental Complaint and Ensuing Litigation

In 2009, the Oklahoma legislature passed H.B. 1483, which substantially overhauled the water permit application process. H.B. 1483, 52nd Leg., 1st Sess. (Okla. 2009). Tarrant supplemented its complaint to challenge five more statutory provisions, including four from H.B. 1483, on both dormant Commerce Clause and Supremacy Clause grounds.

First, Tarrant challenged one of the new criteria that the OWRB must use when ruling on applications: "If the application is for use of water out of state, the Board shall . . . evaluate whether the water that is the subject of the application could feasibly be transported to alleviate water shortages in the State of Oklahoma." OKLA. STAT. tit. 82, §105.12(A)(5).

Second, Tarrant challenged a new restriction on the OWRB's discretion: "No permit issued by the Oklahoma Water Resources Board to use water outside the boundaries of the State of Oklahoma shall . . . [i]mpair the ability of the State of Oklahoma to meet its obligations under any interstate stream compact." *Id.* § 105.12A(B).

Third, Tarrant challenged a post-approval application review process that applies only to out-of-state uses of water:

> Permits and amendments that authorize the use of water outside the state shall be subject to review by the Board at least every ten (10) years after the date of issuance to determine whether there has been a substantial or ma-

> terial change . . . The Board may impose additional conditions as described by Board rules to address any such substantial or material change.

Id. § 105.12F.

Fourth, Tarrant challenged a new version of the longstanding legislative approval requirement: "No permit for the use of water out of state shall authorize use of water apportioned to the State of Oklahoma under an interstate compact unless specifically authorized by an act of the Oklahoma Legislature and thereafter as approved by it." *Id.* § 105.12A(D).

Fifth and finally, Tarrant challenged Oklahoma's statutorily enshrined "state water plan," which declares: "Water use within Oklahoma should be developed to the maximum extent feasible for the benefit of Oklahoma so that out-of-state downstream users will not acquire vested rights therein to the detriment of the citizens of this state." *Id.* § 1086.1(A)(3).

OWRB filed a motion to dismiss and, in the alternative, for summary judgment. OWRB argued for dismissal on two grounds: that the court should defer to the Red River Compact Commission under the doctrine of primary jurisdiction and that H.B. 1483 had impliedly repealed all of the originally challenged statutes. In the alternative, OWRB asked for summary judgment on the dormant Commerce Clause and Supremacy Clause claims. On November 18, 2009, the district court denied OWRB's motion to dismiss on primary jurisdiction and implied repeal, but granted summary judgment for OWRB on the Supremacy Clause and dormant Commerce Clause claims. *See Tarrant I,* 2009 WL 3922803.

In rejecting the implied repeal arguments, the court noted that the Supreme Court disfavors such arguments. *Id.* at *2. H.B. 1483 included no explicit repealer, and the legislative history of H.B. 1483 demonstrated that the Oklahoma legislature had consciously chosen not to adopt an explicit repealer that had been included in previous drafts of the bill. *Id.*

On primary jurisdiction, the court explained that the dormant Commerce Clause and Supremacy Clause arguments involved issues of law instead of issues of fact "not within the conventional experience of judges"—the type of issues the doctrine of primary jurisdiction was meant to include. *Id.* at *2-3. Therefore, the court found no reason to defer to the Red River Compact Commission.

The court next analyzed the dormant Commerce Clause challenge and based its decision on "the nature of an interstate compact, the language Congress used . . . and the logical import of that language." *Id.* at *5. It found no controlling precedent: "So far as the court can determine, no case has squarely addressed the question of whether Congress' approval of compact language like that involved here is sufficient to insulate state statutes from Commerce Clause scrutiny." *Id.* at *4. The court found *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941 (1982), the precedent that Tarrant primarily relied upon, distinguishable because that case involved non-compacted water. "Here, the circumstances are at least one step removed from those existing in *Sporhase*. The particular compact involved here (the RRC) is directly applicable to the water in issue and it specifically contemplates dividing the water—allocating it—

between the states involved." *Tarrant I*, 2009 WL 3922803 at *4.

The court proceeded to the text of the Compact. "The language of the RRC does not explicitly say 'states can limit or stop the out-of-state shipment of water' nor does it make any explicit reference to the Commerce Clause, dormant or otherwise. But the court does not read the various cases to require that level of specificity." *Id.* at *5. The court instead looked to "[t]he principal purpose and effect of the [Red River Compact]," which, the court determined, was to protect state water resources: "[N]one of the many cases concluding Congress' intent to supplant the Commerce Clause was insufficiently clear or insufficiently expressed involved circumstances where the essence of what Congress *did* do was to *allocate* resources between states." *Id.* at 6*. "[I]n light of the right of Oklahoma to control compact waters within its borders not inconsistent with the compact and in the absence of a showing that a particular statute is *necessarily* inconsistent with the compact," the court concluded that "the superseding effect (over otherwise applicable Commerce Clause standards) extends to all water covered by the compact." *Id.*

The district court then turned to Tarrant's Supremacy Clause claim. Tarrant focused its preemption argument on an alleged conflict between § 5.05(b)(1) of the Red River Compact and Oklahoma water statutes governing appropriation and use of water located within Oklahoma. *See* § 5.05(b)(1), 94 Stat. 3305. In particular, Tarrant argued that § 5.05(b)(1) allocates to Texas a share of Reach II, Subbasin 5 water that Tarrant can divert from the Oklahoma side of Subbasin 5 and use in Texas unrestrained by the Oklahoma statutes that place bur-

dens on out-of-state water use. The district court addressed the preemption issue in one paragraph and held that the Compact does not preempt Oklahoma water statutes: "The compact itself explicitly states it is not intended to supplant any state legislation if it is otherwise consistent with the compact." *Tarrant I*, 2009 WL 3922803 at *7.

Tarrant also argued that the Oklahoma statutes it challenged should be invalidated under the dormant Commerce Clause insofar as they apply to water not governed by the Compact because Congress has not consented to any state burdens on interstate commerce in non-compacted water. In its order, the district court stated that because Tarrant had yet to execute a contract to export water that was not subject to the Compact, Tarrant's claims were too speculative. *Id.* The court granted Tarrant leave to amend the complaint should a contract be reached. *Id.* at *8.

3. Tarrant's Attempts to Access Water Not Subject to the Red River Compact

After the November 18, 2009 order, Tarrant signed a contract to acquire groundwater from landowners in Stephens County, Oklahoma and agreed to an MOU with the Apache Tribe about its potential water rights. On July 16, 2010, the district court ruled that neither of these agreements created a justiciable controversy. *Tarrant II*, 2010 WL 2817220 at *1. The court found that Tarrant lacked standing on the Stephens County claim because the contract Tarrant had signed was for groundwater. Most of the statutes Tarrant challenged applied only to stream water, and the remaining statutes it challenged also did not apply. *Id.* at *1-2. The court determined that the Apache Tribe issue was not ripe because the

MOU agreement was too contingent. *Id.* at *2-3. The court noted that the Apache Tribe's water rights were not clear. It was therefore premature to address any potential dormant Commerce Clause issues based on the Apache Tribe water. *Id.*

Tarrant filed a timely appeal. After oral argument, we requested supplemental briefing on the question of whether Tarrant had standing to raise its preemption claim.

Because the district court granted a final judgment for OWRB, we have jurisdiction under 28 U.S.C. § 1291.

II. DISCUSSION

A. Issues and Standards of Review

First, we address Tarrant's claim that the Oklahoma statutes are invalid under the dormant Commerce Clause. Second, we consider whether the Compact preempts the Oklahoma statutes in Reach II, Subbasin 5. Third, we discuss whether Tarrant has a justiciable claim to challenge the Oklahoma statutes under the dormant Commerce Clause as they apply to water not subject to the Compact.

As to the district court's grant of OWRB's motion for summary judgment on the dormant Commerce Clause and Supremacy Clause issues, "[w]e review summary judgment decisions de novo, applying the same legal standard as the district court." *Willis v. Bender*, 596 F.3d 1244, 1253 (10th Cir. 2010) (quotations omitted). Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

For the district court's dismissal of Tarrant's claim based on agreements with the Stephens County landowners and the Apache Tribe, "[w]e review de novo . . . the district court's determination of subject-matter jurisdiction." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 599 F.3d 1165, 1175 (10th Cir. 2010) (quotations omitted). "We review the . . . court's findings of jurisdictional facts for clear error." *Id.* (quotations omitted).

B. Dormant Commerce Clause

We start with a brief review of the dormant Commerce Clause analytical framework and the standard for assessing whether Congress has consented to laws that might otherwise violate the dormant Commerce Clause. We also discuss the relationship between the dormant Commerce Clause and the Compact Clause. We then turn to the district court's decision and the parties' arguments. The foregoing sets the stage for our own consent analysis.

1. Implicit Restriction on State Power

The Commerce Clause provides that Congress has power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3. It is both an enumerated grant of power to Congress and an implicit restriction on state interference with interstate commerce. Since *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 318 (1851), *overruled on other grounds by Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the Supreme Court has read the Commerce Clause to restrain state power even without congressional action. The Court has limited what states may do with interstate commerce by interpreting the negative implications of the Commerce

Clause—"these great silences of the Constitution." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949).

State discrimination against interstate commerce generally will be struck down as unconstitutional unless the state can show a strong public purpose. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978). "At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

Nondiscriminatory state laws can also be invalidated when they impose an undue burden on interstate commerce. *See Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959). "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

2. Congressional Consent to State Action

In 1945, the Supreme Court recognized the "undoubted" power of Congress "to redefine the distribution of power over interstate commerce" by "permit[ting] the states to regulate the commerce in a manner which would not otherwise be permissible" under the dormant Commerce Clause. *S. Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945). Congressional consent can transform otherwise unconstitutional state action into permissible state action.

One leading precedent on congressional consent is *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408

(1946). The McCarran-Ferguson Act provided that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." Ch. 20, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011-1015). In *Prudential*, the Supreme Court held that the Act ratified a South Carolina tax on out-of-state insurance companies. *Prudential*, 328 U.S. at 429-31. Because there was no comparable tax on in-state companies, the tax would have violated the dormant Commerce Clause without congressional action. *Id.* at 417-18. The Court explained how Congress gave consent:

> This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it "shall be subject to" the laws of the several states in these respects.

Id. at 429-30.

Two cases expanded on the *Prudential* analysis. In 1983, the Court held that the Federal Power Act, 41 Stat. 1063 (1920) (codified as amended at 16 U.S.C. §§ 791a-824k), did not insulate state statutes from the dormant Commerce Clause. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340-41 (1982). The Court recognized as "well settled that Congress may use its powers under the Commerce Clause to confer 'upon the States an ability to restrict the flow of interstate commerce that they

would not otherwise enjoy.'" *Id.* at 339-40 (quoting *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980)).

The Act's language—that the federal law "shall not . . . deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line"—did not constitute consent *New England Power*, 455 U.S. at 341 (quoting § 201(b), 41 Stat. 1063 (codified as amended at 16 U.S.C. § 824(b))). "[T]his provision is in no sense an affirmative grant of power to the states to burden interstate commerce 'in a manner which would otherwise not be permissible.'" *New England Power*, 455 U.S. at 341 (quoting *S. Pac.*, 325 U.S. at 769). The Court explained that "Congress did no more than leave standing whatever valid state laws then existed relating to the exportation of hydroelectric energy. . .[the statute] simply saves from pre-emption under Part II of the Federal Power Act such state authority as was otherwise 'lawful.'" *New England Power*, 455 U.S. at 341.

In 1985, by contrast, the Supreme Court upheld Massachusetts and Connecticut statutes that gave advantages to New England banks over banks from other regions. *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 175 (1985). The Court found that Congress intended to insulate such laws from a dormant Commerce Clause challenge when it passed the Bank Holding Company Act of 1956, ch. 240, 70 Stat. 133 (codified as amended, 12 U.S.C. § 1841 *et seq.*). "When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." *Ne. Bancorp*, 472 U.S. at 174. Although they reached different outcomes, these cases stand for the

principle that whether Congress has consented to state regulation of interstate commerce depends on the language of the particular federal statute.

3. *The* Sporhase/Wunnicke *Standard for Congressional Consent*

The Supreme Court elaborated its standard for determining Congress's intent to consent to state statutes in *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 960 (1982), a principal case in the parties' briefs and the district court's decision. *Sporhase* recognized that water is included in interstate commerce. *Id.* at 953-54. It found that a Nebraska law restricting the interstate transfer of groundwater violated the dormant Commerce Clause. *Id.* at 957-58. Although the groundwater at issue was not covered by an interstate compact, the *Sporhase* Court acknowledged that federal water statutes, including congressional approvals of interstate water compacts, showed deference to state law. *Id.* at 958-59. This general deference to state law, however, did not constitute "expressly stated" congressional consent to immunize the Nebraska law from dormant Commerce Clause scrutiny. *Id.* at 960 (quoting *New England Power*, 455 U.S. at 343).

The Nebraska law discriminated against interstate commerce by preventing the withdrawal of groundwater from any well in Nebraska for use in another state unless the other state granted reciprocal opportunities to withdraw and transfer groundwater to Nebraska. *Id.* at 960. The Court found the reciprocity requirement not "narrowly tailored" to serve Nebraska's water conservation goals. *Id.* at 957-58.

Two years later, the Court cautioned that the phrase "expressly stated" in *Sporhase* had "no talismanic significance." *South-Central Timber Dev. Inc. v. Wunnicke*, 467 U.S 82, 91 (1984). Alaska had required that timber taken from state lands be processed within the state before export. The *Wunnicke* Court held that this state law was not authorized by Congress. *Id.* at 90. The Court clarified that an express statement is just one way Congress can manifest intent. *Id.* at 88. What matters is that Congress "affirmatively contemplate" that it is consenting to state protectionism and that its intent is "unmistakably clear." *Id.* at 91-92. The Court cautioned that a law that "appears to be consistent with federal policy—or even that state policy furthers the goals . . . that Congress had in mind—is an insufficient indicium of congressional intent." *Id.* at 92.

4. The Compact Clause and the Commerce Clause

This case also involves Congress's authority to approve interstate compacts. The Compact Clause provides: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State." U.S. CONST. art. I, § 10, cl. 3. The Supreme Court has said that interstate disputes "may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the Federal constitution. We say . . . that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power." *Colorado v. Kansas*, 320 U.S. 383, 392 (1943).

Congressional ratification elevates interstate compacts to federal law. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). "[W]here Congress has autho-

rized the states to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause." *Cuyler v. Adams*, 449 U.S. 433, 440 (1981).

As federal law, interstate compacts themselves cannot be challenged under the dormant Commerce Clause. *Intake Water Co. v. Yellowstone River Compact Comm'n*, 769 F.2d 568, 569-70 (9th Cir. 1985). In *Intake Water*, the plaintiffs challenged the Yellowstone River Compact itself, not state statutes. *Id.* at 569. The Ninth Circuit concluded that "the Compact cannot, by definition, be a state law impermissibly interfering with commerce but is instead a federal law, immune from attack." *Id.* at 570. This case does not include a challenge to the Compact, but the Compact is the focus of our analysis. We must examine the relationship between the Compact and the Oklahoma water statutes to decide whether Congress has displaced the restrictions of the dormant Commerce Clause.

5. The District Court and the Parties' Arguments on the Compact and Consent

Before conducting our own consent analysis, we review the district court's and the parties' interpretations of the Compact.

The district court explained that "[t]he language of the RRC does not explicitly say 'states can limit or stop the out-of-state shipment of water' nor does it make any explicit reference to the Commerce Clause, dormant or otherwise. But the court does not read

the various cases to require that level of specificity." *Tarrant I*, 2009 WL 3922803 at *5.

The district court then turned to the specific Compact provisions, noting that the Compact said it "govern[ed] the use, control and distribution of the interstate water" and "provide[d] an equitable apportionment" of that water. *Id.* (quoting the Compact, §§ 1.01(a), 1.01(b), 94 Stat. 3305). The court also pointed to Compact language stating that the Signatory States "may use the water allocated to it by this Compact in any manner deemed beneficial by that state," that a state's "failure . . . to use any portion of the water allocated to it shall not constitute relinquishment or forfeiture of the right to such use," and that nothing in the Compact "shall interfere or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, *and control* of water . . . not inconsistent with its obligations under this Compact." *Id.* (quoting §§ 2.01, 2.04, 2.10). The court also emphasized that many of the provisions that apportion water say that "the pertinent state 'shall have free and unrestricted use.'" *Id.* (using as examples §§ 4.02(b), 4.03(b)).

The district court concluded that "[t]he principal purpose and effect of the [Compact]" was to protect state water resources: "[N]one of the many cases concluding Congress' intent to supplant the Commerce Clause was insufficiently clear or insufficiently expressed involved circumstances where the essence of what Congress *did* do was to *allocate* resources between states." *Id.* at *6.

Tarrant argues on appeal that the Supreme Court has set a high standard for finding congressional consent and quotes the "expressly stated" and "unmistakably clear" language from *Wunnicke*. Tar-

rant contends that the Compact's language giving Oklahoma "free and unrestricted use" to water in Reach I, Subbasin 2—which covers the location of its Beaver Creek and Cache Creek applications—merely gives Oklahoma a "perpetual preference for the use of [that] water" and "discharges Oklahoma from any obligation to guarantee a downstream delivery." Aplt. Opening Br. at 43. Tarrant claims that the Oklahoma statutes "exceed the scope of any congressional consent to discriminate" and that the statutes were not enacted "pursuant to any compact." *Id.* at 44, 45.

OWRB emphasizes the Compact's language granting to Oklahoma "free and unrestricted use" of the water in the relevant subbasins. OWRB also argues that compacts are inherently protectionist, noting that "when a state enters into an interstate water compact, it always does so in order to promote and protect the use of water within its own boundaries." Aple. Reply Br. at 52. The reason Congress is even required to consent to Compacts, the OWRB claims, is that compacts allocate water to states so that they may protect their shares. *Id.* at 53.

6. Consent Analysis

To determine whether Congress consented to the Oklahoma statutes, we must examine the Compact. *Sporhase* is distinguishable because in that case Nebraska was attempting to regulate the interstate transfer of groundwater that was not subject to an interstate compact. *See Sporhase*, 458 U.S. at 960. In this case, the water is subject to the Red River Compact, and the issue is whether the Compact insulates Oklahoma's statutes from dormant Commerce Clause challenge.

An interstate compact "remains a legal document that must be construed and applied in accordance with its terms." *Texas v. New Mexico*, 482 U.S. at 128. We recently decided whether a compact authorized state restrictions on interstate commerce and emphasized that the inquiry into Congress's intent begins with examination of the language of the compact itself. *See EnergySolutions, LLC v. Utah*, 625 F.3d 1261, 1271 (10th Cir. 2010); *see also Montana v. Wyoming*, — U.S. —, 131 S.Ct. 1765, 1779 (2011) (interpreting the Yellowstone River Compact by looking to its "plain terms.").

The Compact apportions water among the four compacting states. It also authorizes the states to regulate the use of apportioned water. The broad language of key Compact provisions inoculates the Oklahoma statutes challenged here from dormant Commerce Clause attack. We reach this conclusion understanding the case law as calling for caution before insulating arguably protectionist state laws from dormant Commerce Clause scrutiny. The Compact, however, contains the clear statement of congressional authorization of state regulation that *Sporhase* and *Wunnicke* require.

a. *Section 2.01*

The Compact explicitly defers to and recognizes plenary state authority over water use: "Each Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state." *Id.* § 2.01. This provision continues: "Each state may freely administer water rights and uses in accordance with the laws of that state." *Id.* By ratifying that Oklahoma may "freely administer" apportioned water and use it "in any manner" the state

deems beneficial, Congress conferred broad regulatory authority on the state using unqualified terms.

b. *Section 2.10*

Section 2.10 echoes and reinforces § 2.01's expansive acknowledgement of state discretion: "Nothing in this Compact shall be deemed . . . to interfere within its boundaries the appropriation, use, and control of water." *Id.* § 2.10. This reaffirmation of state "control of water," in addition to state "appropriation" and "use" authority, encompasses state restrictions on what water appropriators may do with their appropriated water.

Section 2.10's non-interference language might suggest no more than preservation of existing state laws without protecting them from dormant Commerce Clause attack, similar to the Federal Power Act in *New England Power*. *See* § 201(b), 41 Stat. 1063 (codified as amended at 16 U.S.C. § 824(b)). But the Compact's Interpretive Comments refute this suggestion and confirm our reading of § 2.10. As to Article II of the Compact, which includes § 2.10, the Interpretive Comments explain that "each state is free to continue its existing internal water administration, or to modify it in any manner it deems appropriate." Aplt. App. Vol. I, 251. When read in the context of the Compact as a whole, § 2.10 supports congressional consent to the states to regulate water apportioned to them.

Even if the Compact had intended to preserve then-existing state water laws, it preserved some protectionist state laws. Some of the statutes that Tarrant challenges as treating in-state and out-of-state water use differently predate the signing and ratification of the Compact and would have been fa-

miliar to the Compact's drafters. *See* H.B. 1596, 33rd Leg., 1st Sess. (Okla. 1972) (enacting OKLA. STAT. tit. 82, § 1085.22 and amending OKLA. STAT. tit. 82, § 1085.2(2) and OKLA. STAT. tit. 82, § 105.16). Accordingly, when Congress ratified the Compact and granted to each state the power to "freely administer" the water, it gave congressional consent to the pre-Moratorium statutes at issue here, just as Congress in the McCarran-Ferguson Act gave "support to the existing and future state systems for regulating . . . insurance." *Prudential Ins. Co.*, 328 U.S. at 429.

c. *Sections 4.02 and 5.05*

The foregoing general provisions demonstrate the Compact's deference to state authority. The Compact also includes specific provisions that apportion water in each subbasin and assign authority over the water to the relevant state. Tarrant's Beaver Creek and Cache Creek applications seek to appropriate water from Reach I, Subbasin 2. Section 4.02(b), which apportions Reach I, Subbasin 2, provides: "The State of Oklahoma shall have free and unrestricted use of the water of this subbasin." See § 4.02(b), 94 Stat. 3305. The phrase "unrestricted use" does not distinguish between apportioned water that has or has not been appropriated or between apportioned water that has or has not been permitted for transport out of state. It plainly indicates that the state is not limited in how it uses its apportioned water. Identical "unrestricted use" language appears in many other Compact provisions apportioning water. *See id.* §§ 4.03(b), 5.01(b), 5.02(b), 5.04(b), 6.04(b), 7.01(b), and 8.01.

Tarrant's Kiamichi River application seeks to appropriate water in Reach II, Subbasin 5. The apportionment of Reach II, Subbasin 5 is more complex

because the subbasin encompasses parts of four states. We discuss § 5.05, which apportions Reach II, Subbasin 5, in detail below because it forms the basis of Tarrant's preemption claim. We conclude that § 5.05, like the Compact's other apportionment provisions, confers authority to the states to regulate water use within their respective boundaries.

d. *Purpose and State Authority*

The Compact states its purpose to govern the "use, control and distribution" of the compacted water. *See id.* § 1.01(a). As our discussion of the Compact provisions shows, the Compact is replete with language recognizing each state's broad regulatory authority over the water apportioned to that state. Section 1.01(a), therefore, manifests the wide scope of state authority. The word "control" is unqualified and, along with the words "use" and "distribution" and the Compact sections that follow, indicates that each Signatory State is authorized to regulate the appropriation and transport of apportioned water and that such authorized regulation is not limited to particular purposes.

* * *

Taken together, the Compact provisions using words and phrases such as "unrestricted use," "control," "in any manner," "freely administer," and "nothing shall be deemed to interfere" give the Oklahoma Legislature wide latitude to regulate interstate commerce in its state's apportioned water. Such provisions were completely lacking in the *Sporhase* case. Indeed, there was no compact specifically applicable to the water in *Sporhase*. See 458 U.S. at 941.

The district court noted that the Oklahoma statutes are consistent with the Compact. *See Tarrant I*, 2009 WL 3922803, at *6. As the Supreme Court said in *Wunnicke*, consistency of state law with federal policy alone may be a necessary but not a sufficient condition to find congressional consent. *Wunnicke*, 467 U.S. at 92. We agree that the Oklahoma statutes are consistent with the Compact, but, beyond consistency, we rest our decision on the language of the Compact itself as providing congressional consent.

In view of our conclusion that the Red River Compact gives Oklahoma wide berth to protect its compacted water against out-of-state transfer and use, we do not address whether the Oklahoma statutes that were challenged here would be constitutional under the dormant Commerce Clause in the absence of the Compact.

C. Preemption

Tarrant argues that § 5.05(b)(1) of the Compact preempts certain Oklahoma water statutes. As previously explained, this preemption argument is limited to Tarrant's application for water in Reach II, Subbasin 5 of the Red River Basin. The district court considered the preemption issue and concluded that "there is no necessary conflict between the federal law here in question—the RRC—and the state laws plaintiff challenges. The compact itself explicitly states it is not intended to supplant any state legislation if it is otherwise consistent with the compact." *Tarrant I*, 2009 WL 3922803 at *7.

We understand the district court's one-paragraph discussion and general holding that the Compact is consistent with and does not preempt the Oklahoma statutes as including a holding that § 5.05(b)(1) does

not conflict with the Oklahoma water statutes. We do not paint this issue with such a broad brush and think it merits a more extensive and focused preemption analysis, emphasizing language of § 5.05(b)(1) of the Compact.

We conduct that analysis in five steps. First, we explain why Tarrant has standing to raise this claim. Second, we examine the preemption doctrine, noting that the presumption against preemption is especially strong in areas of longstanding state policy. Third, we review some of the Compact's key general provisions, which indicate that Congress did not intend to preempt state water laws. Fourth, we examine § 5.05(b)(1) and show that it can and should be read to be consistent and not in conflict with the Oklahoma statutes. Fifth, we address Tarrant's arguments.

1. Standing

At oral argument questions were raised about Tarrant's standing to bring its preemption claim. We asked the parties for supplemental briefing limited to this issue. After considering the parties' arguments, we find that Tarrant has standing.

Tarrant claims that § 5.05(b)(1) of the Compact authorizes it to take water to Texas from the portion of Reach II, Subbasin 5 that is located in Oklahoma, water that Tarrant claims is apportioned in part to Texas under the Compact. Tarrant has filed an application with the OWRB to appropriate such water for use in Texas. The justiciability of Tarrant's Subbasin 5 preemption claim rests on the same basis as its dormant Commerce Clause claim arising from applications to the OWRB. The alleged Article III injury is the interference of the Oklahoma water laws

with Tarrant's efforts to import water from Oklahoma.

We addressed standing in a recent preemption case that also involved the relationship between federal law and state statutes as they applied to a pending agency application in *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004). The Skull Valley Band sought to build a spent nuclear fuel storage facility on its tribal lands in Utah and applied to the Nuclear Regulatory Commission for a license. *Id.* at 1227-28. The State of Utah passed a series of statutes that required the Governor's approval for any such facility in the state. *Id.* at 1228-29. The Skull Valley Band sued various Utah officials, arguing that federal law preempted the Utah statutes. *Id.* at 1227. The Utah officials sought dismissal for lack of standing. *Id.* The district court denied the motion. *Id.* at 1230-31. We affirmed. *Id.* at 1254.

We explained in *Skull Valley* that "a party seeking a license from a governmental agency generally has standing to challenge an allegedly invalid law that either imposes substantial burdens upon the applicant or flatly prohibits the activity in question." *Id.* at 1234. Although Tarrant is applying to a state agency rather than a federal agency as in *Skull Valley*, the *Skull Valley* analysis applies here. Tarrant is seeking a permit from a government agency, the OWRB, and alleges the Oklahoma statutes are invalid as applied to Reach II, Subbasin 5 because they are preempted. If Tarrant is correct that the Compact gave it a right to appropriate water in Reach II, Subbasin 5, the Oklahoma statutes would burden that right because they treat in-state and out-of-state water use differently. We conclude that

Tarrant, like the Skull Valley Band, has alleged an Article III injury and has standing to raise its preemption claim.

Our holding here is consistent with our earlier decision in *Sevenoaks* that Tarrant's dormant Commerce Clause and preemption claims are ripe. We explained that "a fair reading of the statutes at issue demonstrates that the OWRB is arguably precluded from granting [Tarrant's] application. [Tarrant] has thus shown it faces an appreciable threat of injury sufficient to invoke federal jurisdiction." *Sevenoaks*, 545 F.3d at 910.

The parties dispute whether Texas is receiving its share of the water of Reach II, Subbasin 5. But, as Tarrant has clarified, its preemption argument does not rely on whether Texas is receiving its share. *See* Aplt. Supplemental Br. at 2. Tarrant's claim is that § 5.05(b)(1) of the Compact allows Texas appropriators to take water from the Oklahoma portion of Reach II, Subbasin 5 on an equal footing with Oklahoma appropriators regardless of whether Texas is receiving its share of compacted water. *See id.* at 6.

OWRB has also argued that Tarrant lacks standing because only Texas or other Signatory States may raise claims under the Compact. This argument overlooks that the Compact itself anticipates Compact litigation involving parties other than the Signatory States: "The United States District Courts shall have original jurisdiction . . . of any case or controversy involving the application or construction of this Compact; that said jurisdiction shall include, but not be limited to, suits between Signatory States." § 13.03. Tarrant's preemption claim "involv[es] the application or construction of the Compact." Whether or not Tarrant is correct about its preemption read-

ing of the Compact, it has taken the steps it needs for judicial review.

Tarrant also has prudential standing because it does not "seek to pursue another person's legal rights, litigate a mere generalized grievance, or raise a challenge falling outside the zone of interests protected by the law involved." *Raley v. Hyundai Motor Co., Ltd.*, 642 F.3d 1271, 1275 (10th Cir. 2011) (summarizing prudential standing factors). Tarrant claims its own right to appropriate Oklahoma water in Reach II, Subbasin 5 for use in Texas. Its grievance is specific to its pending Kiamichi River application. And if Tarrant's Compact interpretation is correct, the Compact would protect Tarrant's alleged interest in Reach II, Subbasin 5 water. If Tarrant's claim must fail, it fails as a matter of law, not as a matter of standing.

2. Preemption Doctrine

We start our analysis of Tarrant's claim with some basic principles of the preemption doctrine. In determining whether a state statute is preempted, "[t]he purpose of Congress is the ultimate touchstone." *See Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963). Federal statutes can preempt state statutes either by an express statement of preemption or by implication. "Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose." *Altria Grp. v. Good*, 129 S.Ct. 538, 543 (2008).

Express preemption arises from explicit preemption language in the statute. Implied preemption includes field preemption or conflict preemption. Field preemption occurs when Congress "take[s] unto itself all regulatory authority" by legislating in a "field

which the States have traditionally occupied." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Conflict preemption occurs "where Congress has not completely displaced state regulation in a specific area" and where "state law is nullified to the extent that it actually conflicts with federal law." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

This case does not concern express preemption—the Compact does not explicitly mention preemption. It also does not concern field preemption because the Compact explicitly disavows interference with state laws. *See* § 2.10, 94 Stat. 3305 ("Nothing in this Compact shall be deemed . . . to [i]nterfere . . . within its boundaries the appropriation, use, and control of water"). We are left with implied conflict preemption. We agree with the district court that "[i]f Congress has not fully displaced state regulation over the particular subject matter, state law is preempted to the extent it actually conflicts with federal law so as to render compliance with both impossible." *Tarrant I*, 2009 WL 3922803 at *7. The issue here is whether the Oklahoma water statutes that Tarrant challenges and § 5.05(b)(1) of the Compact are compatible or whether they conflict.

Implied conflict preemption occurs "when it is impossible . . . to comply with both state and federal requirements." *Pliva, Inc. v. Mensing*, 564 U.S. —, 131 S. Ct. 2567, 2577 (2011). This can be a physical impossibility: "A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132,

142-43 (1963). Short of physical impossibility, state law may still stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

The Supreme Court has recognized a presumption against implied conflict preemption. *See Wyeth v. Levine*, 555 U.S. 555, —, 129 S. Ct. 1187, 1195 (2009); *California v. ARC America Corp.*, 490 U.S. 93, 101-102 (1989); *Hillsborough Cnty. v. Automated Med. Lab., Inc.*, 471 U.S. 707, 716 (1985); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002). "We rely on the presumption [against preemption]" out of "respect for the States as independent sovereigns in our federal system." *Wyeth*, 555 U.S. at —, 129 S. Ct. at 1195, n.3 (quotations omitted).

The Court is especially reluctant to find preemption in matters of longstanding state regulation. "In all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quotations and citation omitted). The presumption against preemption is particularly strong in this case because history reveals "the consistent thread of purposeful and continued deference to state

water law by Congress." *California v. United States*, 438 U.S. 645, 653 (1978).

3. The Compact's Deference to State Water Regulation

The Compact starts with a series of "General Provisions" that inform interpretation of its specific sections and demonstrate pronounced federal deference to state water law. *See* §§ 2.01-2.14, 94 Stat. 3305. The first of these provisions grants broad discretion to states to regulate the use of their water apportionments: "Each Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state." *Id.* § 2.01. In addition, states may also regulate water use by their respective appropriators: "Each state may freely administer water rights and uses in accordance with the laws of that state." *Id.* This language is evidence of Congress's consent to, not preemption of, state water regulations.

The Compact further declares that it does not displace state water law: "Nothing in this Compact shall be deemed . . . to . . . [i]nterfere . . . within its boundaries the appropriation, use, and control of water . . . not inconsistent with its obligations under this Compact." *Id.* § 2.10. We understand this language to caution against reading preemption into the Compact's other provisions.

Many of the Compact's allocation provisions give "free and unrestricted use of the water" to the state in which the water is located. *See id.* § 4.02(b); *see also* §§ 4.03(b), 5.01(b), 5.02(b), 5.03(b), 5.04(b), 6.04(b), 7.01(b), and 8.01. The Compact's general policy is to give the Compact states unrestricted authority to regulate their apportioned water.

These Compact provisions that authorize broad state control of water support our holding that the Compact gives congressional consent to the states to adopt measures protecting their water apportionments that might otherwise violate the dormant Commerce Clause. We must analyze the specific language of § 5.05(b)(1) as part of a Compact that generally reinforces rather than undermines state water regulation.

4. Section 5.05(b)(1) of the Red River Compact

Section 5.05 of the Compact defines Reach II, Subbasin 5 to include parts of Oklahoma, Texas, and Arkansas without reference to state lines. Why did the Compact drafters do this? As we explain below, both the language and purpose of this section show that the subbasin was designed to ensure that an equitable share of water from the subbasin reaches the states downstream from Oklahoma and Texas.

Reach II, Subbasin 5 encompasses "that portion of the Red River, together with its tributaries, from Denison Dam down to the Arkansas [-] Louisiana state boundary, excluding all tributaries included in the other four subbasins of Reach II." *Id.* § 5.05(a). Parts of Oklahoma, Texas, and Arkansas are located within Reach II, Subbasin 5. A map of Reach II, Subbasin 5 appears at the end of this opinion.

The Compact prescribes three allocation schemes for the water in Reach II, Subbasin 5, depending on the flow level of the Red River at the Arkansas-Louisiana border: one allocation when the flow is above 3,000 cubic feet per second (cfs), another when the flow is between 3,000 and 1,000 cfs, and a third when the flow is below 1000 cfs. *Id.* § 5.05.

Section 5.05(b)(1) apportions Reach II, Subbasin 5 when flow levels are above 3,000 cfs:

> (b) Water within this subbasin is allocated as follows: (1) The Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second.

The phrase "equal rights to the use of" in § 5.05(b)(1) needs to be read in context. To understand § 5.05(b)(1), we start by examining the states' obligations under the low flow provisions of § 5.05(b)-(2) and § 5.05(b)(3), and then return to § 5.05(b)(1). We conclude with the general purpose of § 5.05.

a. *Sections 5.05(b)(2) and (b)(3)*

The Compact provides that when the flow is below 1,000 cfs, the upstream states "shall allow a quantity of water . . . within their respective states to flow into the Red River as required to maintain a 1,000 cubic foot per second flow at the Arkansas-Louisiana state boundary." *Id.* § 5.05(b)(3). This duty under § 5.05(b)(3) recognizes each state's authority to regulate water use within its boundaries.

When the flow rises to a level between 1,000 and 3,000 cfs, the upstream states still have minimum flow obligations, but now Louisiana receives a fixed percentage of the water instead of a fixed flow level. The "States . . . shall allow to flow into the Red River for delivery to the State of Louisiana a quantity of water equal to 40 percent of the total weekly runoff

originating in subbasin 5." *Id.* § 5.05(b)(2). Again, the states have an obligation to Louisiana, and, again, are expected to tell their appropriators whether water can be used or must be left to flow downstream to meet this obligation. The caveat that follows this language reinforces the emphasis on state control: "this requirement shall not be interpreted to require any state to release stored water." *Id.* § 5.05(b)(2).

b. *Section 5.05(b)(1)*

Section 5.05(b)(1) applies when the flow of the Red River exceeds 3,000 cfs. During these high flow periods, the "Signatory States shall have equal rights to the use of" the excess water in Reach II, Subbasin 5. *Id.* § 5.05(b)(1). The upstream states do not need to curtail the water use of their appropriators to ensure Louisiana a minimum flow level because she is already receiving 3,000 cfs.

The next part of § 5.05(b)(1) says: "[N]o state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second." Section 5.05(b)(1), like the other provisions in § 5.05(b), is intended to protect downstream Louisiana from the upstream states diverting too much water. Whereas § 5.05(b)(2) and § 5.05(b)(3) reserve a minimum flow level to Louisiana, § 5.05(b)(1) secures Louisiana's interests indirectly by ensuring that the three upstream states will not take more than 25 percent each of the excess water, allowing the remaining 25 percent to flow downstream to Louisiana.

c. *Section 5.05 Generally*

The Compact's Interpretive Comments support the foregoing reading of § 5.05. The Comments explain: "In subbasin 5 . . . the upstream states cooperate in assuring reliable flows to Arkansas and Loui-

siana. This is accomplished by keying the upstream states' obligation to the flow at the Arkansas-Louisiana boundary." Aplt. App. Vol. I, 263-64. The Interpretive Comments do not identify another purpose for § 5.05 and do not suggest any intent to preempt state law.

Section 5.05(c) also reinforces that the purpose of § 5.05 is to ensure a minimal flow to downstream states. Although Arkansas is an upstream state relative to Louisiana, it is a downstream state relative to Oklahoma and Texas. Just as § 5.05(b) seeks to ensure that Oklahoma, Texas, and Arkansas deliver a minimum flow level to Louisiana, § 5.05(c) seeks to ensure that Oklahoma and Texas deliver a minimum flow level to Arkansas. It states: "Whenever the flow at Index, Arkansas, is less than 526 c.f.s., the states of Oklahoma and Texas shall each allow a quantity of water . . . within their respective states to flow into the Red River: Provided, however, this provision shall be invoked only at the request of Arkansas." Id. § 5.05(c) (emphasis added

d. *Section 5.05 – No Preemption*

Taken together, the provisions of § 5.05 stand for the principle that the upstream states control the water within their boundaries, provided they meet their minimum flow obligations to downstream states and do not take more than an equal share of the excess water. Sections 5.05(b)(2) and 5.05(b)(3) tell us what happens during periods of low flow. The upstream states must act to ensure that Louisiana receives its minimum level of water. Once the flow into Louisiana reaches 3,000 cfs, § 5.05(b)(1) kicks in.

Section 5.05(b)(1), like (b)(2) and (b)(3), obligates the upstream states to ensure that Louisiana rece-

ives its 3,000 cfs. It also addresses what happens to the water that exceeds 3,000 cfs. It says that each state has "equal rights to the use of" that water, and that no state is "entitled to more than 25 percent." It does not say that a Texas user is entitled to take Texas's share of that water from a tributary located in Oklahoma. And it does not say that the OWRB is precluded from applying Oklahoma water laws to a Tarrant application to divert water in Oklahoma for use in Texas. Although such inferences may be arguable based on the language of § 5.05(b)(1) alone, neither is reasonable when § 5.05(b)(1) is read in conjunction with the Compact as a whole. And even if they were reasonable inferences, both run afoul of the presumption against preemption when § 5.05(b)-(1) can also be read to limit access to each state's share of the excess water to locations in the particular state.

This journey through the § 5.05(b) subsections demonstrates that protecting water flow to the downstream states was the raison d'être of § 5.05, including § 5.05(b)(1). To read more into § 5.05, especially to read it as conflicting with Oklahoma law, requires inferences that § 5.05 does not expressly support and that the general Compact provisions pronouncing deference to, noninterference with, and broad authorization for state law do not allow. The following discussion of Tarrant's arguments further shows why this is so.

5. Preemption and Tarrant's Arguments

Tarrant interprets "equal rights to the use" in § 5.05(b)(1) not only to grant Texas a share of excess water, which it does, but also to mean that a Texas user such as Tarrant can access that water from anywhere in the subbasin, including Oklahoma, and

not be subject to Oklahoma laws that restrict out-of-state use of water. We cannot agree with this interpretation. Section 5.05(b)(1) does not expressly say what Tarrant interprets it to say. Too many factors preclude Tarrant's interpretation. First, preemption is disfavored in this area of longstanding state regulation of water. Second, the Compact provisions generally call for pronounced deference to, not displacement of, state water laws. Third, as shown above, § 5.05(b)(1) itself can reasonably be read to foreclose Tarrant's interpretation. Fourth, nothing in the Interpretive Comments to the Compact supports Tarrant's interpretation. Fifth, a compact that authorizes state regulatory water laws so as to insulate them from dormant Commerce Clause challenge, as this one does, is unlikely to preempt those very same laws.

Tarrant notes that the phrase "equal rights to the use of" is not qualified by any reference to state borders. But borders still matter in § 5.05. The opening clause of § 5.05(b) says that the "[w]ater within this subbasin is allocated" to the signatory states, and the ensuing flow level provisions described earlier are framed in terms of state entitlements and obligations. Tarrant even attempts to support its interpretation by suggesting that borders *do* matter under § 5.05(b)(1). It argues that the part of Texas located within Reach II, Subbasin 5 contains "primarily intermittent streams and dry arroyos yielding a small fraction of the total water flowing in Subbasin 5," and that Texas users must divert some water in Oklahoma for Texas to secure its equal share. *See* Aplt. Opening Br. at 30. If § 5.05(b)(1) erased borders completely, it should be immaterial whether Tarrant could access Texas's share in Texas.

Tarrant also argues that we should interpret § 5.05(b)(1) in light of the history of federal reservoirs constructed in southern Oklahoma on the damsites that lead into Subbasin 5. Tarrant argues that Congress authorized and funded the reservoirs to satisfy the water demands of north central Texas. Tarrant further notes that § 2.02 of the Compact states that water taken from a federal project "shall be charged to the state or states receiving the benefit therefrom." § 2.02, 94 Stat. 3305. Apart from failing to show any connection between the reservoir projects and § 5.05 of the Compact, Tarrant's argument also cannot be squared with its claim that any of the four states, not just Texas, can access excess water anywhere in Reach II, Subbasin 5.

Tarrant tries to avoid § 2.10's interpretive rule of non-interference with state water regulation by noting that it is qualified by the phrase "not inconsistent with [a state's] obligations under this Compact." *Id.* § 2.10(a). But this begs the question of how § 5.05(b)-(1) should be read. Tarrant claims that allowing Oklahoma to restrict Tarrant from appropriating water from Reach II, Subbasin 5 for use in Texas would be inconsistent with Oklahoma's obligations under § 5.05(b)(1). But, as we have shown and will reinforce below, the better reading of the Compact is that it does not obligate Oklahoma to allow Texas entities to appropriate Texas's share of § 5.05(b)(1) water from within Oklahoma's boundaries.

Tarrant attempts to read more into § 5.05(b)(1) than this provision was meant to or can support. It was designed to ensure minimum water flow to states downstream from Oklahoma. "[E]qual rights to the use of" can reasonably be read to mean that each signatory state has the same opportunity and

entitlement to use up to 25 percent of the excess water in its state and under its state laws. This reading is consistent with the state water laws in the Compact states. It may be possible to identify a different interpretation of this phrase so that it conflicts with the Oklahoma state water laws, but simply finding a possible alternative take on the meaning of federal law does not establish preemption.

Even if Tarrant's interpretation of § 5.05(b)(1) were plausible, accepting that interpretation would require us to embrace the paradoxical position that Congress, in approving the Red River Compact, both consented broadly to state burdens on interstate commerce and preempted state law. To suggest that§ 5.05(b)(1) gives appropriators such as Tarrant license to come into Oklahoma and appropriate water for use in Texas in contravention of Oklahoma law runs counter to the purpose of the Compact, the purpose of § 5.05(b)(1), and the presumption against preemption when there is no clear conflict between state and federal law and the state law applies to a matter of historic state concern. The conflict must be clear as an Oklahoma stream, and Tarrant cannot meet that test.[2]

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[2] Even under Tarrant's reading of § 5.05(b)(1), it is arguable whether the Compact conflicts with all of the Oklahoma statutes that Tarrant challenges. For example, the most recent of the legislative approval statutes provides: "No permit for the use of water out of state shall authorize use of water apportioned to the State of Oklahoma under an interstate compact unless specifically authorized by an act of the Oklahoma Legislature and thereafter as approved by it." OKLA. STAT. tit. 82, § 105.12A(D). If Tarrant is correct that § 5.05(b)(1) apportions water in Reach II, Subbasin 5 to Texas that Tarrant can access in Oklahoma, this statute does not appear to conflict with the

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In addition to its arguments on the merits, Tarrant complains that the district court addressed this issue "sua sponte" without "adequate notice and opportunity to present countervailing arguments and evidence." Aplt. Opening Br. at 14. But Tarrant alleged in its first complaint that the "Compact allocates to Texas the right to take water from certain stream segments in Oklahoma" and that the Compact would therefore preempt the Oklahoma statutes. Aplt. App. Vol. 1, 42.[3] It regarded this Supremacy Clause claim as tightly bound with its dormant Commerce Clause claim. After summary judgment was entered against it, Tarrant continued to present arguments to the district court on the preemption claim. *See* Aplt. App. Vol. IV, 1334-38. Our review of the district court proceedings does not produce sufficient concern to refrain from our review of the preemption claim here. The district court decision on preemption could have been more detailed and spe-

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Compact. On the other hand, some statutes are in tension with Tarrant's reading of the Compact. For example, "[i]f the application is for use of water out of state, the Board shall . . . evaluate whether the water that is the subject of the application could feasibly be transported to alleviate water shortages in the State of Oklahoma." *Id.* § 105.12(A)(5).

[3] Tarrant has also told the district court and this court that it could provide additional evidence in support of its preemption claim. Tarrant says that there remains a "disputed fact question" regarding the Reach II, Subbasin 5 issue, but does not specify what it is. *See* Aplt. Reply Br. at 20. The only fact we take the parties to dispute— whether Texas can receive a 25 percent share of the excess water in the Texas part of Reach II, Subbasin 5—is not necessary to our disposition of this issue because we hold that § 5.05(b)(1) does not allocate water located in Oklahoma to Texas regardless of what amount of water Tarrant and other Texas users can appropriate in Texas.

cific, but the court did consider and resolve the preemption issue. *See* Aplt. App. Vol. IV, 1332. After reviewing the issue at greater length, we affirm.

D. Stephens County and Apache Tribe

We now address the justiciability of Tarrant's dormant Commerce Clause claim that is based on its attempts to access water in Oklahoma that is not subject to the Compact.

This issue stands in contrast to the one we addressed in 2008 when we held that Tarrant's claims regarding compacted water are justiciable. OWRB had argued that the case was not ripe and should be dismissed because the OWRB had yet to act on Tarrant's water appropriation permit applications. We rejected that argument "because a plaintiff challenging the constitutionality of a state statute has a sufficiently adverse legal interest to a state enforcement officer sued in his representative capacity to create a substantial controversy when . . . the plaintiff shows an appreciable threat of injury flowing directly from the statute." *Sevenoaks*, 545 F.3d at 910 (quotation omitted). Because Oklahoma's statutes require the OWRB to treat in-state and out-of-state water use differently in ruling on applications, "the OWRB is arguably precluded from granting [Tarrant's] application. [Tarrant] has thus shown it faces an appreciable threat of injury sufficient to invoke federal jurisdiction." *Id.*

Tarrant had filed an application with the OWRB for each of its Beaver Creek, Cache Creek, and Kiamichi River plans, and those applications formed the basis for our justiciability decision in *Sevenoaks*. By contrast, neither Tarrant, the Stephens County landowners, nor the Apache Tribe has filed an applica-

tion with the OWRB regarding Tarrant's hopes to use the Stephens County or Apache Tribe water. The question here, therefore, is whether Tarrant has a justiciable claim with respect to either its Stephens County or Apache Tribe agreements.

1. The District Court Order

The district court found that Tarrant lacks standing to raise the Stephens County claim and that the Apache Tribe claim is not yet ripe. *See Tarrant II*, 2010 WL 2817220, at *3. On the Stephens County issue, the court analyzed the Oklahoma statutes that Tarrant seeks to challenge and failed to find any statutes that apply to Tarrant's contract. Most of the statutes apply only to the OWRB stream water application process. *Id.* at *1-2. The remaining statutes also do not apply to the Stephens County groundwater that Tarrant seeks to purchase. *Id.* Without any application pending before the OWRB and without any statute that Tarrant challenges applying even if there were an application, Tarrant suffered no article III injury that would create standing. *Id.* In a footnote, the court added that, because none of the challenged Oklahoma statutes applies to the Stephens County water at issue, the amended complaint fails to state a claim and therefore could be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). *Id.* at *2 n. 7.

On the Apache Tribe issue, the district court found the agreement too speculative to support justiciability. *Id.* at *3. The MOU contained nothing more than a promise to negotiate in good faith if and when the Apache Tribe determined its water rights. *Id.* The court said it was not clear that the Apache Tribe had any water it was willing to sell to Tarrant, and, therefore, the case was not ripe. *Id.*

2. Tarrant's Arguments

In its brief, Tarrant refers only obliquely and never explicitly to the Stephens County issue and instead focuses on the Apache Tribe agreement. Tarrant's arguments about the MOU, however, address standing—the basis for the district court's dismissal of the Stephens County claim—rather than ripeness, the basis for the district court's dismissal of the Apache Tribe claim. After OWRB in its Answer Brief challenges Tarrant on this point, Tarrant claims "the same analysis applies to both doctrines." Aplt. Reply Br. at 1.

Tarrant offers two arguments against the district court's rulings. First, Tarrant claims it does not need to enter into specific water transactions to create a justiciable controversy. Second, Tarrant reads the district court's order on justiciability to require for standing that the Oklahoma statutes be the only obstacle preventing it from exporting the Oklahoma water to Texas. Tarrant contends that obstacles other than the statutes should not prevent the court from reaching Tarrant's challenge to the Oklahoma statutes as they apply to non-compacted water.

3. OWRB's Arguments

OWRB focuses on the Apache Tribe claim and argues that the relevant issue is ripeness, not standing. OWRB emphasizes that Tarrant's promise to "work cooperatively" with the Apache Tribe does not constitute an agreement to buy and sell water. OWRB further argues that the Apache Tribe may decide not to file an application with the OWRB if the Tribe's water rights are federal in origin and not subject to state administration. *See* Aplt. App. Vol. III, 830. According to OWRB, Tarrant will not suffer

hardship from a dismissal for lack of ripeness. Such a dismissal effectively calls for the Apache Tribe to ascertain what water rights it has and whether the Tribe wants to sell water to Tarrant before Tarrant can challenge the constitutionality of the Oklahoma statutes as they apply to Apache Tribe water.

4. Stephens County

"Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, — U.S. —, 130 S. Ct. 2743, 2752 (2010). As for the injury element, "the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quotations and citations omitted). As we have explained, "a main focus of the standing inquiry is whether plaintiff has suffered a present or imminent injury, as opposed to a mere possibility, or even probability, of future injury." *Morgan v. McCotter*, 365 F.3d 882, 888 (10th Cir. 2004).

The OWRB has jurisdiction over the permitting process for groundwater. *See* OKLA. STAT. tit. 82, § 1020.7. The groundwater permit process is separate from the surface water appropriation application process. *See generally id.* § 1020. The criteria that the OWRB uses in deciding on applications for groundwater permits are different from surface water applications and are enumerated in a different statute. *Compare id.* § 1020.9 *with id.* § 105.12.

Tarrant has standing to challenge the Oklahoma statutes governing the OWRB's surface water appropriation permit process because it is an applicant on its Beaver Creek, Cache Creek, and Kiamichi River plans and the statutes interfere with its applications. *See Sevenoaks*, 545 F.3d at 910 (holding that "the OWRB is arguably precluded from granting [Tarrant's] application. [Tarrant] has thus shown it faces an appreciable threat of injury sufficient to invoke federal jurisdiction.") However, Tarrant lacks standing on its claim based on the Stephens County groundwater. None of the Oklahoma statutes that Tarrant wishes to challenge as violating the dormant Commerce Clause applies to Tarrant's potential groundwater interest, and it has not filed an application to appropriate groundwater. Tarrant lacks standing to challenge Oklahoma's surface water permit application laws based on the Stephens County claim because it has not suffered a justiciable injury.

We think Tarrant's claim fails on ripeness grounds as well. Neither Tarrant nor the Stephens County landowners are applicants for a permit. That Tarrant or one of the landowners in Stephens County may in the future apply for a groundwater permit is an insufficient basis for a ripe case or controversy.[4]

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[4] We also agree with the district court that Tarrant fails to state a claim arising from the Stephens County transaction and that this issue could be dismissed under Federal Rule of Civil Procedure 12(b)(6). We instead affirm on standing because it is a threshold jurisdictional issue. *See Horne v. Flores*, — U.S. —, 129 S. Ct. 2579, 2592 (2009).

5. Apache Tribe

The ripeness doctrine aims "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). "Like standing, the ripeness inquiry asks whether the challenged harm has been sufficiently realized at the time of trial. The ripeness issue, however, focuses not on whether the plaintiff was in fact harmed, but rather whether the harm asserted has matured sufficiently to warrant judicial intervention." *McCotter*, 365 F.3d at 890 (quotation omitted). As we have explained, "[i]n determining whether a claim is ripe, a court must look at [1] the *fitness* of the issue for judicial resolution and [2] the *hardship* to the parties of withholding judicial consideration." *Skull Valley*, 376 F.3d at 1237 (quotation omitted).

The relationship between the Red River Compact and surface water owned by the Apache Tribe is fraught with complex questions of federalism, tribal sovereignty, and the reserved water rights doctrine. We should not resolve the issue unless and until it is determined what rights the Apache Tribe has to Oklahoma surface water and whether the Apache Tribe decides to sell that water to Tarrant. There will be no hardship to Tarrant from this dismissal as it waits for the Apache Tribe to ascertain its water rights and then negotiates a contract to export the water to Texas.

"In evaluating ripeness the central focus is on whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *Initiative and Referen-*

dum Inst. v. Walker, 450 F.3d 1082, 1097 (10th Cir. 2006) (quotations omitted). That statement accurately describes the claim at issue here. The district court correctly dismissed the Apache Tribe issue as not ripe.

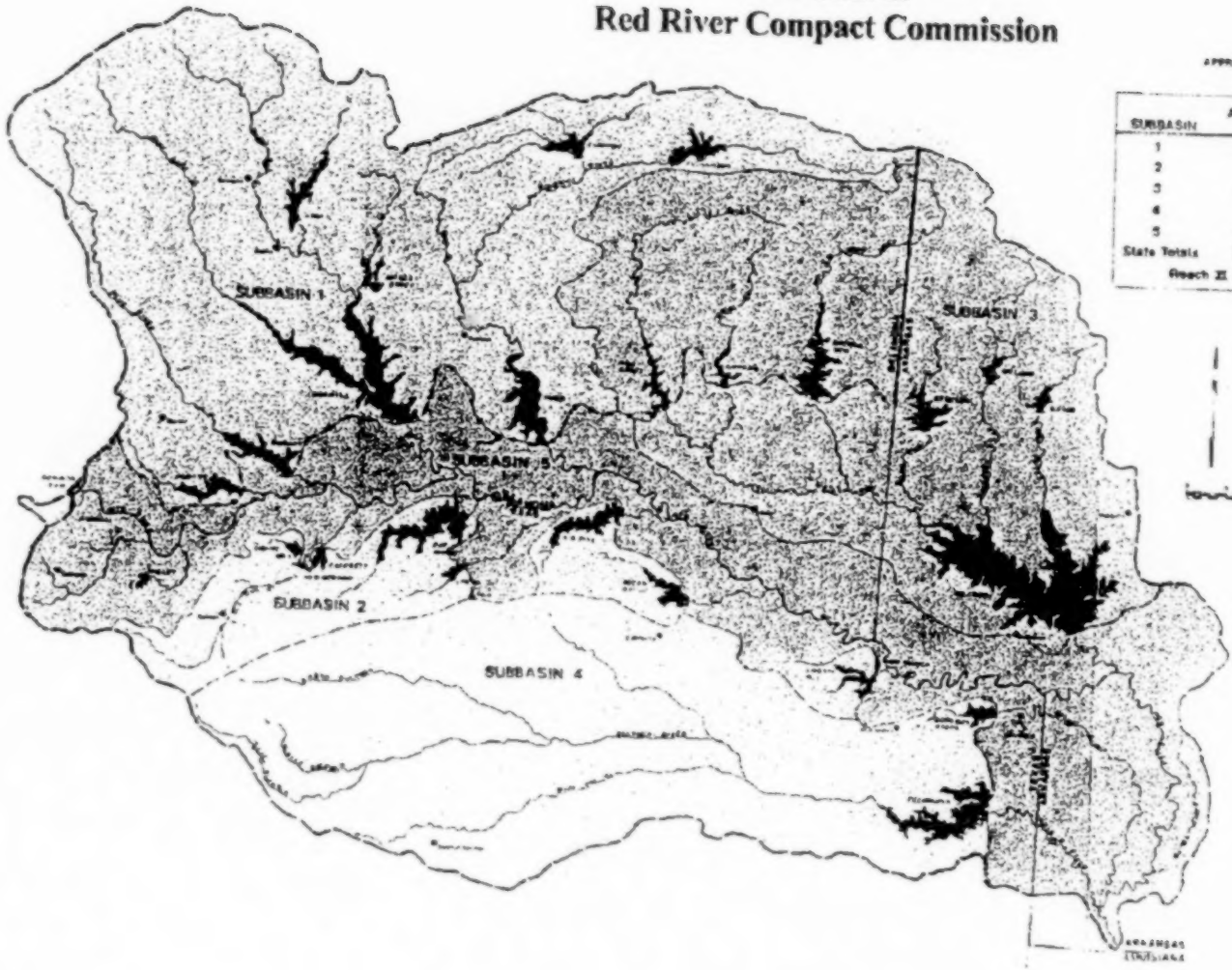
III. CONCLUSION

Our role is not to pass judgment on the economic policy implications of the Red River Compact. Our role is to ascertain what the Compact says about state regulation of apportioned water. We hold that the Red River Compact insulates Oklahoma water statutes from dormant Commerce Clause challenge insofar as they apply to surface water subject to the Compact. We also uphold the Oklahoma statutes against Tarrant's preemption claim. We do not address Tarrant's challenge to the Oklahoma statutes insofar as they apply to water not subject to the Compact because Tarrant's claim on that issue is not justiciable.

After oral argument, Tarrant moved to strike certain parts of OWRB's supplemental appendix regarding the Reach II, Subbasin 5 issue because the district court had declined to consider the additional materials. We take the Reach II, Subbasin 5 issue to be a matter of Compact interpretation and need not consider the supplemental materials. Therefore, we dismiss the motion to strike.

The district court's grant of summary judgment to OWRB on the dormant Commerce Clause and Supremacy Clause issues is AFFIRMED. The district court's dismissals of the Stephens County and Apache Tribe claims as not justiciable are AFFIRMED.

REACH II
Red River Compact Commission



REACH II
APPROXIMATE DRAINAGE AREAS
(In square miles)

SUBBASIN	ARKANSAS	OKLAHOMA	TEXAS
1	0	4765	0
2	0	0	930
3	1096	2148	0
4	0	0	3480
5	1861	859	1485
State Totals	3557	7771	5895
Reach II Total	17223		

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APPENDIX B

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

TARRANT REGIONAL WATER DISTRICT,
a Texas State Agency,
Plaintiff,

-v.-

RUDOLF JOHN HERRMANN, et al., in their official capacities as members of the Oklahoma Water Resources Board and the Oklahoma Water Conservation Storage Commission,
Defendants.

No. CIV-07-0045-HE

[November 18, 2009]

ORDER

Plaintiff Tarrant Regional Water District commenced this case in early 2007, seeking a declaratory judgment that certain Oklahoma laws unconstitutionally prevented it from appropriating or purchasing water in Oklahoma.[1] Simultaneous with the filing of this case, plaintiff filed three applications with the Oklahoma Water Resources Board ("OWRB") for permits to appropriate surface or stream water for use in Texas. Each application referenced different

[1] Plaintiff is a Texas agency responsible for supplying water to a substantial portion of north Texas.

quantities of water sought to be taken from particular locations in Oklahoma.

Defendants, who are the members of the OWRB, moved to dismiss plaintiff's complaint on various grounds. That motion was denied by this court by order entered October 29, 2007 [Doc. #49]. The denial was upheld on appeal. *Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906 (10th Cir. 2008). A scheduling order was then entered, establishing various deadlines and setting this case on the court's December, 2009, trial docket.

During its regular 2009 session, the Oklahoma Legislature adopted (and the Governor signed) H.B. 1483. That bill amended 82 Okla. Stat. § 105.12, one of the "Anti-Export Statutes" challenged by plaintiff, and added a new section of law applicable to permits for water to be used outside the boundaries of Oklahoma. 82 Okla. Stat. § 105.12A. Plaintiff sought, and the court granted, leave to file a supplemental complaint adding the new or changed laws to those being challenged by plaintiff.

Defendants have now filed their motion to dismiss or, in the alternative, for summary judgment [Doc. #90]. Summarized generally, defendants argue that H.B. 1483 "effectively repealed" Oklahoma's restrictions on out-of-state water sales and renders plaintiff's challenge to them moot, thus depriving the court of subject matter jurisdiction. They also argue that, as issues involving the construction of the Red River Compact ("RRC" hereafter) may control this case, the court should defer to the Red River Compact Commission under the doctrine of primary jurisdiction and dismiss the case. Finally, they argue that, if the controversy is not moot and the merits are reached, then the RRC constitutes an expression

of federal law sufficient to preclude any challenge to H.B. 1483 or, presumably, other similar statutes, on the basis of invalidity under the Commerce Clause of the U. S. Constitution.

The issues raised by the present motion are fully briefed. The court heard oral argument from the parties on October 22, 2009.[2]

Factual Background

As the present motion is, in part, one for summary judgment, a reference to pertinent undisputed facts is appropriate. The submissions of the parties show the following facts to be undisputed. The RRC was entered into by the states of Oklahoma, Texas, Arkansas, and Louisiana in 1978. The compact was approved by Congress and the President in 1980. Pub. L. No. 96-564, 94 Stat. 3305 (Dec. 22, 1980). Plaintiff has filed three applications with the OWRB seeking authority to appropriate water in Oklahoma and export it to end users in north Texas. All involve water from tributaries of the Red River which is subject to the RRC.[3] One application (the "Kiamichi River" application) seeks to appropriate approximately 310,000 acre-feet per year from one of two points of diversion downstream from Hugo Lake, on the Kiamichi River. This location is within Reach II, Subbasin 5 as designated by the RRC. The second applica-

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[2] Defendants have since sought to supplement their summary judgment submissions with additional information about the status of plaintiff's effort to acquire water not subject to the RRC [Doc. #124], to which plaintiff has objected [Doc. #126].

[3] Although plaintiff initially raised technical objections to certain of defendants' asserted undisputed facts, plaintiff conceded at the hearing that all water within the scope of its three pending applications is water subject to the RRC.

tion (the "Cache Creek" application) seeks to appropriate 125,000 acre feet per year from one of two alternative diversion points on Cache Creek, which is located within Reach I, Subbasin 2 per the RRC. The third application (the "Beaver Creek" application) seeks to appropriate water from a diversion point also located in Reach I, Subbasin 2. Under the terms of the RRC, waters in the areas to which the Kiamichi application applies are allocated equally (subject to certain limits) to the four signatory states to the compact. Waters in the areas to which the Cache Creek and Beaver Creek applications apply are allocated solely to Oklahoma.

Jurisdiction - Implied Repeal

Defendants argue that H.B. 1483 impliedly repealed all provisions of Oklahoma law which potentially affect plaintiff's applications and that this case is therefore moot. It argues that H.B. 1483 — in particular, its addition of paragraph G to 82 Okla. Stat. § 105.12 — renders inapplicable all the statutes previously challenged by plaintiff.[4] The court is unpersuaded.

As defendants acknowledge, repeals by implication are not favored. *Nat'l Ass'n. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007). It is presumed that the legislature did not intend, by

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[4] That paragraph provides: "Notwithstanding the provisions of any other law that may be deemed inconsistent with this section, the Board shall promulgate rules and apply the provisions of Section 1 of this act [the new statute — 82 Okla. Stat. § 105.12A] and subsections A, B, D, E, and F of this section to applications for use of water for which no final adjudication has been made by the Oklahoma Water Resources Board before the effective date of this act."

enacting a new statute, to repeal an existing statute by implication. *Strong v. Lauback*, 89 P.3d 1066, 1070 (Okla. 2004). A clear, unequivocal and irreconcilable conflict between the "prior" and "new" statutes must exist to warrant a conclusion that the prior statute was impliedly repealed. *City of Sand Springs v. Okla. Dep't of Welfare*, 608 P.2d 1139, 1151 (Okla. 1980).

Here, the circumstances fall far short of those necessary to warrant a conclusion that all pertinent provisions of Oklahoma law have been impliedly repealed.[5] There is, of course, no explicit repealer in H.B. 1483. It is plain from the text of paragraph G that the legislature had pending applications in mind when it enacted H.B. 1483 and, judging from other background materials submitted by plaintiffs and the circumstances in general, it is clear enough that the pending applications involved in this case were particularly in its mind.[6] Yet it declined to include an explicit repealer in the legislation, rejecting earlier versions of the bill which had done so. Further, while the provisions of H.B. 1483 are, in some

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[5] One provision initially challenged by plaintiff, the outright moratorium on out-of-state water sales, has expired according to its terms. See 82 Okla. Stat. § IB (moratorium expired five years from effective date of the act, i.e. November 1, 2009).

[6] The news clippings and statements of individual legislators submitted by plaintiff are not essential to the court's conclusions, hence it is unnecessary to belabor whether they are evidence which might be formally considered in determining this motion. They do at least illustrate the point which is otherwise obvious — that H.B. 1483 did not create any "clear and unequivocal" conflict with prior law. Indeed, some of the explanations of H.B. 1483 by OWRB personnel illustrate the technique of "doing a little sidestep" made popular by the fictional Texas governor in a popular 1970's musical involving that state.

respects, inconsistent with various provisions of Oklahoma law not explicitly repealed, at least some are not clearly so. Finally, even if the court was otherwise disposed to accept defendants' assessment of H.B. 1483, it would still not make the issues in this case moot. H.B. 1483 itself includes a requirement of approval by the Oklahoma legislature of any permit for out-of-state, but not in-state, use of water apportioned to Oklahoma under an interstate compact.[7] It is undisputed that a portion of the water sought by plaintiff in its permit applications is water allocated to Oklahoma under the RRC.[8] A requirement of legislative approval of an interstate water transfer, when in-state transfers are not similarly conditioned, implicates Commerce Clause concerns. *Sporhase v. Nebraska*, 458 U.S. 941, 955-56 (1982).[9] Whatever the ultimate outcome of a substantive challenge to the statute might be, there is nonetheless a real question left in play by the nature of H.B. 1483's requirements and plaintiff's claims.

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[7] Title 82 Okla. Stat. § 105.12A (section 1 of H.B. 1483) provides in part: "D. No permit for the use of water out of state shall authorize use of water apportioned to the State of Oklahoma under an interstate compact unless specifically authorized by an act of the Oklahoma Legislature and thereafter as approved by it."

[8] See undisputed facts 3-7, Def. 's Br. 4-5 [Doc. #901. Specifically, the "Cache Creek" and "Beaver Creek" applications involve water allocated wholly to Oklahoma under the RRC.

[9] *Sporhase* did not conclude that a requirement of legislative approval necessarily violates the Commerce Clause. Rather, it noted that differing requirements for in-state versus out-of-state transfers "would be inconsistent with the ideal of even-handedness in regulation" but also acknowledged "there are legitimate reasons for the special treatment accorded to requests to transport ground water across state lines." *Id.*

In any event, for multiple reasons,[10] the court concludes the passage of H.B. 1483 has not rendered this controversy moot.

Deferral to the Commission - Doctrine of Primary Jurisdiction

Defendants argue the court should dismiss or stay this case based on the doctrine of "primary jurisdiction." They argue that some or all of the issues raised as to the RRC by plaintiff's claims can and should be presented first to the Red River Compact Commission, a body formed under the RRC, as its determination may make the current controversy go away or at least inform the court's further decisions as to matters involving compact interpretation. Defendants indicate they have posed to that body certain questions which grow out of the issues in this case. Plaintiff objects, arguing that the doctrine of primary jurisdiction does not apply and that, in any event, deferral to the Commission is not appropriate in the present circumstances.

The doctrine of primary jurisdiction is a prudential doctrine designed to allocate decision-making authority between courts and administrative agencies. In general, it applies where a particular issue arising under a regulatory scheme has been assigned by Congress to an administrative body, to take advantage of that body's special expertise or competence in

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[10] Plaintiff argues that the complaint's reference ¶ 25) to plaintiff's interest in acquiring water by other means — i.e. water other than "compacted" water — leaves issues for disposition even if the court accepts defendants argument that the RRC precludes a Commerce Clause violation. For reasons discussed more fully hereafter, the court has not relied on that argument in concluding H.B. 1483 does not moot the issues in this case.

the area. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 750-51 (10th Cir. 2005). In determining the doctrine's application, courts evaluate both the need to promote consistent application of the regulatory scheme involved and the interest in court reliance on agency expertise in resolving "issues of fact not within the conventional experience of judges." *Id.*, citing *Far East Conference v. United States*, 342 U.S. 570, 574 (1952).

The court concludes the doctrine of primary jurisdiction does not require or warrant the dismissal or stay of this case. The claims asserted by plaintiff here, though involving issues of compact interpretation, are not based directly on the assertion of rights under the RRC. Moreover, the claims involve what are essentially issues of statutory construction and matters of law, rather than factual matters requiring the resolution of issues of fact "not within the conventional experience of judges." Further, it is unclear whether the Commission's authority even arguably extends to adjudicating disputes like those involved here, as its authority involves the "making of findings, recommendations, or reports" rather than determining a disputed issue. However, any question in that regard, as applicable to this dispute, is resolved by the express language of the RRC, which provides in pertinent part:

> The making of findings, recommendations, or reports by the Commission shall not be a condition precedent to the instituting or maintaining of any action or proceeding of any kind by a Signatory State in any court or tribunal, or before any agency or officer, for the protection of any right under this Com-

> pact or for the enforcement of any of its provisions . . .

RRC, Sec. 10.01(g). If a signatory party to the Compact is not required to "exhaust" this administrative process before proceeding to court, it makes no sense to suggest that a non-party should.

The court concludes the doctrine of primary jurisdiction does not warrant the dismissal or stay of this case.

"Dormant" Commerce Clause Claim

The principal thrust of defendants' motion is its argument that the RRC operates to preclude the Commerce Clause and Supremacy Clause claims asserted by plaintiff. The Commerce Clause, Art. I, § 8, cl. 3 of the Constitution, generally "precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders . . ." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982). Water, regardless of its status as property or non-property under state law, is an "article of commerce" to which the Commerce Clause is applicable. *Sporhase*, 458 U.S. at 953. Congress therefore has the power to regulate commerce in water and, where it does so, Congress' determination controls. Where Congress has not affirmatively acted to establish federal policy in an area, the Commerce Clause nonetheless constitutes an implicit restraint on state regulation. *United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). However, the existence of unexercised federal power (i.e. the "dormant" aspect), coupled with the fact that water is an article of commerce, does not necessarily render state laws which address

or regulate it unconstitutional. *Sporhase*, 458 U.S. at 954. The determination of the constitutionality of state statutes affecting interstate commerce involves consideration of, among other things, the nature and effect of the statute in issue and the relationship of the statute to the local purpose or interest involved. *See generally Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Plaintiff's Commerce Clause claim raises those issues with respect to the challenged Oklahoma regulatory scheme.

However, as all parties recognize, the "dormant" Commerce Clause is applicable only where Congress' power to regulate in fact lays dormant. If Congress acts to authorize a particular activity or regulation by the states, that state activity is immune from Commerce Clause attack even if it would otherwise be contrary to "dormant" Commerce Clause principles. *Northeast Bancorp, Inc. v. Bd. of Gov. of Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985) ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."). Defendants argue that Congress, by its ratification of the RRC, has acted to authorize (for water subject to the compact) the sorts of limitations Oklahoma has placed on the interstate sale or transfer of water.

It is, of course, undisputed that Congress has ratified the Red River Compact. Once Congress has approved an interstate compact, the compact becomes more than just an agreement between the involved states. It also becomes, in legal effect, a federal statute. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). And, as noted above, a federal statute can supply the authorization for a state regulatory scheme that would otherwise be contrary to Com-

merce Clause principles. The central question raised by defendants' motion is whether the compact involved here, the RRC, is a sufficiently clear expression of Congressional intent to do that.

As plaintiffs correctly note, the test for determining whether Congress has authorized the state regulatory scheme in issue is an exacting one. As the *Sporhase* court noted: "In the instances in which we have found such consent [to otherwise impermissible burdens on commerce], Congress' 'intent and policy' to sustain state legislation from attack under the Commerce Clause was 'expressly stated.'" 458 U.S. at 960 (citing *New England Power Co. v. New Hampshire*, 455 U.S. at 343, and *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427 (1946)) (internal quotation marks omitted). Some cases have stated the standard as being whether Congress' intent was "unmistakably clear." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984).[11] Still, the degree of specificity required is not without limits.[12]

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[11] The *South Central* court stated at 91: "There is no talismanic significance to the phrase 'expressly stated,' however; it merely states one way of meeting the requirement that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear."

[12] For example, in the *Prudential Ins. Co.* case, supra, the question was whether Congress, by passing the McCarran Act, intended to insulate from Commerce Clause scrutiny a South Carolina tax statute which imposed a gross receipts tax on insurers organized out of state, but not on in-state insurers. The McCarran Act included language stating state regulation and taxation of insurers was in the public interest, and that its silence should not be interpreted as a barrier to that regulation or taxation, but there was no reference to "discriminatory" tax schemes or the like, as opposed to taxation generally.

The ultimate question is one of determining congressional intent.

So far as the court can determine, no case has squarely addressed the question of whether Congress' approval of compact language like that involved here is sufficient to insulate state statutes from Commerce Clause scrutiny. Plaintiff relies on *Sporhase*, correctly noting it is the Supreme Court case which dealt most closely with issues like those involved here. But *Sporhase*, though it's language provides some support for plaintiff's position, did not involve the same circumstances as are present here. *Sporhase* involved a Commerce Clause challenge to a Nebraska statute which had the effect of limiting the exportation of ground water to certain neighboring states.[13] Nebraska argued that Congress' intent to defer to state water laws as to ground water was shown by a variety of federal statutes and two interstate water compacts. The Supreme Court rejected the argument, concluding the language in the various statutes addressing federal projects and the compacts did not evidence an intent to remove constitutional constraints on the pertinent state laws:[14]

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[13] "The Nebraska statute required a permit to withdraw ground water for transportation to another state. It also prohibited the issuance of a permit in circumstances where the laws of the transferee state did not reciprocally permit transfer of water from that state to Nebraska. *Sporhase*, 458 U.S. at 944. The transferee state involved, Colorado, did not grant reciprocal rights to Nebraska.

[14] A typical statute provided that "nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation." *Sporhase*, 458 U.S. at 959.

"Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce." *Id.* at 960. However, the interstate water compacts relied on by Nebraska addressed surface water, rather than ground water, and were directed at showing some broad federal deferral to state water laws in general. Here, the circumstances are at least one step removed from those existing in *Sporhase*. The particular compact involved here (the RRC) is directly applicable to the water in issue and it specifically contemplates dividing the water — allocating it — between the states involved.

But just as *Sporhase* does not provide a definitive answer to the question posed here, neither does the principal authority offered by defendants. They rely on *Intake Water Co. v. Yellowstone River Compact Comm'n*, 769 F.2d 568 (9th Cir. 1985), where the court concluded Congress' adoption of the interstate water compact involved there avoided a Commerce Clause challenge to a restriction on diversion of water outside the Yellowstone River Basin without the unanimous consent of all signatory states. But the difference is that the restrictive provision which arguably violated the Commerce Clause was not included in the statutes of one of the signatory states, *but was included in the compact itself.* The court therefore concluded that, as the arguably offending provision was part of the federal law itself (as part of a congressionally approved compact), it could not be the basis for a dormant Commerce Clause claim.

Here, of course, the challenged restrictions are not in the RRC, but rather are creatures of state statute.

In the absence of controlling authority, the court concludes the most appropriate guide to determining the scope and nature of Congress' intent is to focus on the nature of an interstate compact, the language Congress used (i.e. the language of the RRC which it ratified) and the logical import of that language. The language of the RRC does not explicitly say "states can limit or stop the out-of-state shipment of water" nor does it make any explicit reference to the Commerce Clause, dormant or otherwise. But the court does not read the various cases to require that level of specificity. What the RRC *does* specifically state is that it is intended to remove cause for controversies between the signatory states by "governing the use, control and distribution of the interstate water . . ." RRC, Sec. 1.01(a). It is intended to "provide an equitable apportionment" of the water of the Red River between the various states and to provide a basis for state or joint action by "ascertaining and identifying each state's share" in the water. RRC, Sec. 1.01(b) and (e). Each signatory state "may use the water allocated to it by this Compact in any manner deemed beneficial by that state." RRC, Sec. 2.01. A state's "failure . . . to use any portion of the water allocated to it shall not constitute relinquishment or forfeiture of the right to such use." RRC, Sec. 2.04. Various provisions provide, with respect to waters allocated to Oklahoma or other states, that the pertinent state "shall have free and unrestricted use" of the water allocated to it. *E.g.* RRC, Sec. 4.02(b) (Oklahoma) and 4.03(b) (Texas). Further, the compact states that nothing in it "shall interfere or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, *and control* of wa-

ter . . . not inconsistent with its obligations under this Compact." RRC, Sec. 2.10 (emphasis added).

While the question is close, the court concludes the plain import of these provisions is to effect an allocation or division of the waters covered by the compact and that the essence of that process — allocating some portion of the resource in issue to a particular state or its citizens — is inherently inconsistent with the standards that would *otherwise* apply based on dormant Commerce Clause analysis. Those standards are ordinarily directed to preventing protectionist state measures designed to secure an economic or other advantage for the state or its citizens — that is, to avoiding giving the residents of one state "a preferred right of access, over out-of-state consumers, to natural resources located within its borders . . ." *New England Power Co. v. New Hampshire*, 455 U.S. at 338-39 ("The [challenged order] is precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states. . . . Such state-imposed burdens cannot be squared with the Commerce Clause when they serve only to advance 'simple economic protectionism.'") (citing *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). The principal purpose and effect of the RRC, however, through its provisions for allocation and apportionment of the Red River's waters between the various states, is to do precisely that. As one commentator has noted, in discussing *Sporhase* and interstate compacts:

> *Economic protection is the very purpose of the compact.* The split of unappropriated water is intended to free the states from the need to race for the water under the usually applied (though recently questioned) rule of

> *Wyoming v. Colorado*: "priority is equity" between two states that apply the law of prior appropriation internally, and the same law will fix their shares in an equitable apportionment. A compact halts the race.[15]

As a result, the approval of the RRC by Congress *necessarily* constituted its consent to a legal scheme different from that which would otherwise survive Commerce Clause scrutiny. Moreover, the Oklahoma statutes which plaintiff challenges here — whether wise or not — are not inconsistent with the RRC insofar as they relate to the waters allocated and apportioned to Oklahoma under the compact. Further, in light of the right of Oklahoma to control compact waters within its borders not inconsistent with the compact and in the absence of a showing that a particular statute is *necessarily* inconsistent with the compact,[16] the court concludes, for purposes of the current facial challenge, that the superseding effect (over otherwise applicable Commerce Clause standards) extends to all water covered by the compact, whether apportioned wholly or partially to Oklahoma.

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[15] Frank J. Trelease, *State Water and State Lines: Commerce in Water Resources*, 56 U. Colo. L. Rev. 347, 349 (1985) (emphasis added).

[16] An effort by the State of Texas (or another signatory state) to acquire water allocated to it by the compact, if thwarted by one or more of the challenged statutes, might well give rise to a claim under the compact in favor of that state. But that is not the circumstance presented here. Plaintiff, though a political subdivision of the State of Texas, is not Texas and is not entitled to assert in this proceeding rights which Texas has under the RRC.

So far as the court can determine, none of the many cases concluding Congress' intent to supplant the Commerce Clause was insufficiently clear or insufficiently expressed involved circumstances where the essence of what Congress *did* do was to *allocate* resources between states. For example, both *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) and *New England Power*, *supra*, conclude the Federal Power Act did not constitute or include a congressional determination to supplant the Commerce Clause standards, but there was no suggestion in either case that the FPA was intended to *allocate* resources between particular states. Similarly, in *South Central Timber*, *supra*, national policy as to federal land use was held not to imply approval of parallel state restrictions, but no issue of allocation between the states — of timber or otherwise — was involved. While a more comprehensive and exhaustive review of the cases might conceivably identify a circumstance paralleling the explicit "allocating" or "apportioning" action of Congress involved here, neither the submissions of the parties nor the court's own research have revealed such a case. The circumstances in *Sporhase* are as close an any appear to get but do not, for the reasons noted above, control the result here.

Accordingly, the court concludes that Congress' approval of the RRC constitutes an adoption of standards that preclude a successful Commerce Clause claim in the circumstances existing here, where the water sought via permit or otherwise is within the scope of the RRC. Congress has approved a compact the essential nature of which is to allocate and divide resources.

Supremacy Clause Claim

Plaintiff has also asserted a supremacy clause claim, asserting Oklahoma's statutory scheme is inconsistent with the RRC and hence preempted by federal law. State laws can be preempted in two general ways. If Congress manifests an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not fully displaced state regulation over the particular subject matter, state law is preempted to the extent it actually conflicts with federal law so as to render compliance with both impossible. *California Coastal Com'n. v. Granite Rock Co.*, 480 U.S. 572, 581 (1987). There is, of course, no suggestion here that Congress has generally preempted the field of water law, involving interstate streams or otherwise. Further, there is no necessary conflict between the federal law here in question — the RRC — and the state laws plaintiff challenges. The compact itself explicitly states it is not intended to supplant any state legislation if it is otherwise consistent with the compact. RRC, Sec. 2.10(a). In light of the foregoing discussion as to Congress' intent in the context of a Commerce Clause claim, the court can discern no basis upon which the RRC could be a basis for preemption, at least in the context of any claim which plaintiff has standing to pursue.

Water Not Subject to RRC as Basis for Claim

Plaintiff has also suggested that, even if the court accepted defendants' position as to the effect of the RRC, it should nonetheless permit the challenge to the various statutes to go forward due to plaintiff's interest in acquiring water not subject to the RRC. Plaintiff relies on paragraph 25 of its complaint, which states:

> 25. Plaintiff currently stands willing and able to negotiate for the purchase of water located in Oklahoma, and has identified public and private parties who are interested in negotiating a sale of such water to Plaintiff.

The court concludes, however, that in light of the disposition made here of plaintiff's claims involving water subject to the RRC, any potential claim arising out of plaintiff's interest in non-compacted water is, at this point, too speculative and uncertain to be ripe for resolution. The court previously rejected a ripeness challenge to plaintiffs claims (Order, October 29, 2007, pp. 4-6) [Doc. #49], concluding there was a real and substantial threat of enforcement of the various state statutes as to plaintiff's pending applications. However, as noted above, those applications relate purely to water subject to the RRC and are therefore within the scope of the court's determination of the pending motion. Insofar as the pleadings reflect, there are no applications pending before the OWRB as to water *not* subject to the RRC. Further, the allegations upon which plaintiff relies in this respect do not suggest plaintiff has actually contracted for non-compacted water — only that it is willing and able to do so. It does not allege there are persons willing to sell water to plaintiff — only that it has identified private parties willing to negotiate about it. And of course, other aspects of the "other" water, such as whether it is ground water, stream water subject to a different compact, or otherwise, are likewise unidentified. In these circumstances, the court concludes plaintiff's allegations are insufficient to show a non-speculative basis for concluding that an immediate, appreciable threat of injury to it flows from the challenged statutes. *See Wilson v. Stocker*, 819 F.2d 943, 947 (10th Cir. 1987). Therefore, as a

case or controversy sufficient to support federal jurisdiction does not presently exist as to any remaining claims not otherwise disposed of by this order, they must be dismissed for lack of jurisdiction.

Summary

In accordance with the foregoing, the court concludes defendant's motion should be granted in substantial part. Defendants' mootness and primary jurisdiction arguments are unpersuasive. However, the fact that the water to which plaintiff seeks access is governed by the Red River Compact is sufficient, in the circumstances existing here, to preclude the Commerce Clause and Supremacy Clause claims that plaintiff asserts.

Given the nature of this case, it is perhaps appropriate to note the court's view of what this decision does *not* do. It does not purport to address a potential Commerce Clause claim, by plaintiff or others, to the extent it pursues rights in, or approvals as to, water not subject to the Red River Compact. It does not purport to address in some hypothetical way questions which might arise under *other* compacts to which Oklahoma is a party, as the court's review has been limited to the Red River Compact. It does not anticipate or address the possibility of a claim by Texas or other signatory state *under* the compact, based on a claimed compact violation. That is a circumstance different from the claim presented here. Finally, there is nothing in this order which precludes Oklahoma — if the facts on the ground are roughly as plaintiff has alleged — from negotiating, as a good neighbor, some arrangement to use more effectively the water allocated to it under the Red River Compact. The alleged facts suggest Oklahoma

has ample room to maneuver in that regard, without harming either its long term or short term interests.

Based on the foregoing, defendants' motion to dismiss and/or for summary judgment [Doc. #90] is GRANTED IN PART and DENIED IN PART. It is denied insofar as it seeks dismissal of this case on the grounds of mootness due to recent legislation or based on any need to defer to the Red River Commission, under the doctrine of primary jurisdiction or otherwise. It is granted insofar as it seeks summary judgment as to plaintiff's Commerce Clause and Supremacy Clause claims. Any claim premised on plaintiff's efforts to acquire water not subject to the Red River Compact is dismissed on the basis of ripeness, without prejudice. As to the latter claim, plaintiff is granted leave to file within thirty (30) days an amended complaint addressing the deficiencies noted, if it can do so. Defendant's motion to supplement the record as to that subject matter [Doc. #124] is DENIED.

In light of the disposition effected by this order, the trial setting and existing scheduling order are STRICKEN. The joint motion of the parties for a pretrial conference [Doc. #122] is STRICKEN as MOOT. In light of this disposition, the pending motion to intervene of the Apache Tribe of Oklahoma [Doc. #111] is also STRICKEN as MOOT.[17]

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[17] The court would not be disposed to grant the motion in any event. Apart from questions of timeliness, the motion misconceives the nature of plaintiff's claims here. Plaintiff does not seek to appropriate or apportion water by this lawsuit; rather, it seeks a determination of the constitutionality of the Oklahoma's regulatory scheme. As a result, the disposition of this case

IT IS SO ORDERED.

Dated this 18th day of November, 2009.

/s/
JOE HEATON
UNITED STATES DISTRICT JUDGE

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will not impair, impede, or otherwise affect whatever water rights the Apache Tribe may have or assert.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

TARRANT REGIONAL WATER DISTRICT,
a Texas State Agency,
Plaintiff,

-v.-

RUDOLF JOHN HERRMANN, et al., in their official capacities as members of the Oklahoma Water Resources Board and the Oklahoma Water Conservation Storage Commission,
Defendants.

No. CIV-07-0045-HE

[July 16, 2010]

ORDER

Plaintiff Tarrant Regional Water District commenced this action in 2007 seeking a declaratory judgment that various Oklahoma laws unconstitutionally prevented it from appropriating or purchasing water in Oklahoma. The principal thrust of plaintiff's case at that time was on its efforts to acquire surface or stream water from various locations, which were identified in three permit applications plaintiff filed with the Oklahoma Water Resources Board ("OWRB"). All the waters within the scope of those applications were subject to the Red River Compact. Based on the impact of that status as "compacted" water, the court rejected plaintiff's

Commerce Clause and Supremacy Clause challenges to the various Oklahoma statutes and granted defendants' motion to dismiss or for summary judgment.[1] Order, Nov. 18, 2009 [Doc. No. 134]. However, the court also granted leave to plaintiff to amend its complaint to assert claims based on water not subject to the Red River Compact, if it could do so. Plaintiff has now done so and defendants have again moved to dismiss, arguing that a justiciable controversy does not exist and that the amended complaint fails to state a claim. Also pending is plaintiff's motion to further amend its complaint, seeking to add allegations as to plaintiff's rights to assert Texas' rights under the Red River Compact.

Plaintiff's amended complaint alleges two sets of circumstances upon which its further claims are based. First, it alleges plaintiff has entered into an agreement with certain private owners of water rights in Stephens County, Oklahoma, pursuant to which plaintiff has acquired a 10-year option to purchase the groundwater under a 12-acre tract. (Compl. Ex. 1.) Second, the complaint alleges plaintiff has entered into a memorandum of understanding ("MOU") with the Apache Tribe of Oklahoma, pursuant to which the parties agreed to "work cooperatively to further quantify the Apache Tribe's reserved water rights and to develop mutually agreed terms for the use of certain amounts of such water by TRWD by either purchase or long term lease." (Compl. Ex. 2.) Although for different reasons, the court concludes neither set of allegations is sufficient to make out a "case or controversy" sufficient to confer jurisdiction on the court.

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[1] Defendants are the members of the OWRB.

Stephens County Water Claims

Article III standing is limited to those who allege, among other things, that they have suffered or imminently will suffer an injury. *Morgan v. McCotter*, v. 365 F.3d 882, 888 (10th Cir. 2004). Plaintiff alleges that the challenged laws unconstitutionally obstruct its ability to acquire and utilize the Stephens County groundwater to which its option applies. Defendants argue that the statutes plaintiff point to do not apply to ground water at all or are inapplicable for other reasons and that, as a result, there is no prospect of injury to plaintiff from them.[2] The court concludes defendants' position in this regard is well taken and that the challenged laws do not, on their face, obstruct plaintiff from successfully appropriating the water subject to its option.[3]

Title 82 of the Oklahoma statutes, which governs "Water and Water Rights," includes separate provisions for, among other things, "Stream Water Use" (82 Okla. Stat. §§ 105.1-105.33) and groundwater, i.e., the "Oklahoma Groundwater Law" (82 Okla. Stat. §§ 1020.1-1020.22). Several of the challenged statutes — namely, 82 Okla. Stat. §§ 105.12, 105.12A, and 105.16(B) — apply only to stream water and thus do not stand as an obstacle to plaintiff's

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[2] Defendants concede, appropriately, that the moratorium on the export of Oklahoma water imposed by 82 Okla. Stat. § 1B would constitute an impediment to plaintiff's plan if it were still in place. (Defendants' position as to the moratorium has not always been a model of consistency.) However, the court previously concluded (Order, Nov. 18, 2009) that the moratorium had expired according to its terms.

[3] The challenged statutes are identified in paragraph 23 of the Amended Complaint [Doc. No. 135].

acquisition of groundwater. Title 74 Okla. Stat. § 1221.A, which imposed a moratorium on the creation of intergovernmental state or tribal water compacts or transfers pursuant to them, has, like the § 1B moratorium discussed above, expired according to its terms.[4] Title 82 Okla. Stat. § 1085.22 prohibits the sale of water in storage reservoirs to out-of-state users, circumstances not present here. Title 82 Okla. Stat. § 1266(9) defines entities qualified to be "public agencies" for purposes of the Interlocal Cooperation Act, 74 Okla. Stat. § 1003, and excludes agencies of other states from the definition, but there is nothing in the amended complaint suggesting plaintiff seeks or needs that status. Title 82 Okla. Stat. § 1324.10(B) prohibits (absent consent of the Legislature) the export of water by Rural Water, Sewer, Gas, and Solid Waste Districts, but there is no allegation that plaintiff seeks water from such a district. Finally, plaintiff argues that a 1978 Oklahoma Attorney General Opinion, No. 22-274, construing 82 Okla. Stat. § 1085.2(2), concludes the OWRB should not consider an out-of-state entity to be a proper applicant and that it suggests some general policy against such applicants.[5] Whatever may have been

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[4] Sections 1B and 1221.A include essentially identical terms for expiration: "the moratorium shall be in effect for a five-year period beginning on the effective date of this act or until such time as the State of Oklahoma conducts and completes a comprehensive scientific hydrological study of the water resources of this state."

[5] Plaintiff's amended complaint characterizes the opinion as "concluding that Oklahoma law would not countenance an appropriation of water located in Oklahoma by an out-of-state user," citing a portion of the opinion which states: "Considering these factors together, we consider the proposition unrealistic that an out-of-state user is a proper permit applicant before the

the validity and scope of the opinion in 1978, the court concludes the opinion has been supplanted, at least as to the portions pertinent here, by intervening changes in the law. Title 82 Okla. Stat. § 105.12 now clearly contemplates applications by out-of-state users.[6]

While it is of course impossible to know with certainty how the Board will interpret and apply these or other statutes when and if an application is presented to it, the mere possibility of some future injury to plaintiff is not enough to confer standing in these circumstances, as "a main focus of the standing inquiry is whether plaintiff has suffered a present or imminent injury, *as opposed to a mere possibility, or even probability,* of future injury." *Morgan*, 365 F.3d at 888. The statutes on their face raise no special obstacles to plaintiff's yet-to-be-filed permit application for the export of groundwater. Consequently, the court concludes plaintiff has failed to allege an injury in fact sufficient to meet the standing requirements of Article III.[7]

Oklahoma Water Resources Board." (Pl.'s Am. Compl. ¶ 22 [Doc. No. 135].)

[6] Subsection (5) of § 105.12 provides: "If the application is for use of water out of state, the Board shall, in addition to the criteria set forth in this subsection, also evaluate whether the water that is the subject of the application could feasibly be transferred to alleviate water shortages in the State of Oklahoma."

[7] The court, like the parties, has focused on standing and the jurisdictional prerequisites to suit. However, defendants' motion to dismiss also references Fed. R. Civ. P. 12(b)(6). To the extent plaintiff challenges the various statutes as they relate to the Stephens County groundwater, the amended complaint fails, for substantially the same reasons as discussed above, to state a claim.

Tribal Water Claims

Plaintiffs claims based on the MOU with the Apache Tribe raise somewhat different issues. As alleged in the amended complaint, the tribal water rights which plaintiff seeks to acquire involve both surface water and ground water.[8] It alleges surface waters owned by tribal entities like the Apache Tribe are, for various reasons, not governed by the Red River Compact and are hence outside the scope of the court's November 18, 2009 order. For present purposes, it is unnecessary address the legal merits of those allegations, as the court concludes plaintiff's claims based on its understanding with the Apache Tribe are not ripe for judicial resolution.

"To fall within [a federal court's] subject-matter jurisdiction, a case must raise issues that are ripe." *Coal. for Sustain Res. v. United States Forest Serv.*, 259 F.3d 1244, 1249 (10th Cir. 2001). The ripeness doctrine is "a confused mix of principle and pragmatic judgment reflecting its mixture of article III case and controversy requirements with prudential restraints on the exercise of jurisdiction." *Id.*; *Reno v. Catholic Soc. Serv.*, 509 U.S. 43, 58 n.18 (1993). The doctrine is "designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003); *Morgan*, 365 F.3d at 890. "In evaluating ripeness, the central focus is on whether the case involves uncertain or contingent future events that may not occur as anticipated or indeed may not occur at all." *Walker v. Utah Wildlife Fed'n*, 450 F.3d

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[8] The MOU does not specify the type of water, but instead makes general reference to "reserved water rights."

1082, 1098 (10th Cir. 2006). In determining whether a case is ripe for review, courts consider (1) "the *fitness* of the issue for judicial resolution" and (2) "the *hardship* to the parties of withholding judicial consideration." *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1237 (10th Cir. 2004) (emphasis in original).

Here, the court concludes the arrangement with the Apache Tribe is so fraught with uncertainties and contingencies that it does not provide the necessary basis for a justiciable claim. As a threshold matter, the parties have not reached anything approaching an enforceable agreement such as would give plaintiff the right to utilize whatever water rights the Tribe has. The parties' agreement is labeled a "memorandum of understanding" and expresses only a willingness to agree upon terms some time in the future. The reason for that lack of specificity is fairly obvious, however, as the parties' submissions make clear a bigger problem — it is very much an open question whether the Tribe has any water rights at all which are pertinent to plaintiff's needs and, if so, what those rights are. It is no doubt true, as plaintiff argues, that Indian tribes have reserved rights in water in some circumstances, by treaty or otherwise. But recognizing that general principle or possibility does not mean that the Apache Tribe has such rights and any meaningful answer to that question is likely to be the result of major and separate litigation all by itself.[9] And even if, at some point, the Apache Tribe

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[9] Recognizing (among other things) the substantial and different collateral issues that would necessarily have to be resolved, the court declined to allow intervention by the Apache Tribe in this case. Order, Apr. 30, 2010 [Doc. No. 178].

is able to establish that it in fact has reserved water rights as a general matter, its obligation to pursue any further arrangement with plaintiff is made expressly contingent on the "quantification" of those rights.[10]

The result is that plaintiff is, for present purposes, claiming prospective injury based on the assumption that the Apache Tribe has reserved water rights of some sort, that those rights can be determined and quantified, that the Tribe will ultimately elect to sell some portion of those quantified rights to plaintiff on a mutually acceptable basis, and that, when and if the Tribe does so and plaintiff pursues an application based on those rights, defendants will then apply Oklahoma's statutory scheme in an unconstitutional fashion. The court concludes such a scenario is far too speculative and subject to too many contingencies to set out a controversy ripe for judicial resolution.[11]

Conclusion

For the reasons stated above, defendants' motion to dismiss [Doc. No. 142] is GRANTED. Judgment will be entered in favor of defendants.

Plaintiff's motion for leave to amend its complaint [Doc. No. 161] to add certain allegations re-

---

[10] The extent of the contingencies and collateral issues also suggests that the relative hardship to plaintiff from withholding a legal determination of some sort at this juncture is relatively slight.

[11] The court recognizes, as noted by plaintiff, that it is not necessary for every possible contingency to be resolved for a case to be ripe. *See generally Roe No. 2 v. Ogden*, 253 F.3d 1225, 1232 (10th Cir. 2001). But here, there are so many contingencies that any decision by the court would be tantamount to an advisory opinion. *See Morgan*, 365 F.3d at 882.

garding Texas's authorization of plaintiff to acquire water apportioned to Texas under the Red River Compact is GRANTED and the amended complaint is deemed amended per the motion. However, as the court's prior determination of the various constitutional questions was not grounded wholly, or even principally, on a question of standing, neither the court's prior determination nor this one are affected by the addition.

IT IS SO ORDERED.

Dated this 16th day of July, 2010.

/s/
JOE HEATON
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

TARRANT REGIONAL WATER DISTRICT,
a Texas State Agency,
Plaintiff,

-v.-

RUDOLF JOHN HERRMANN, et al., in their official capacities as members of the Oklahoma Water Resources Board and the Oklahoma Water Conservation Storage Commission,
Defendants.

No. CIV-07-0045-HE

JUDGMENT

In accordance with the court's orders entered November 18, 2009 [Doc. No. 134] and this date, judgment is entered in favor of defendants and against plaintiff on all claims.

IT IS SO ORDERED.

Dated this 16th day of July, 2010.

/s/
JOE HEATON
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TARRANT REGIONAL WATER DISTRICT,
a Texas State Agency,
Plaintiff-Appellant,

-v.-

RUDOLF JOHN HERRMANN, et al.,
Defendants-Appellees.

No. 10-6184

ORDER
October 21, 2011

Before Murphy, Gorsuch and Matheson, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

ELISABETH A. SHUMAKER, Clerk

APPENDIX F

RED RIVER COMPACT WITH SUPPLEMENTAL INTERPRETIVE COMMENTS OF LEGAL ADVISORY COMMITTEE

RED RIVER COMPACT COMMISSION
ARKANSAS-LOUISIANA-OKLAHOMA-TEXAS

September 1979

Section 1.01. The principal purposes of this Compact are:

* * *

(b) To provide an equitable apportionment among the Signatory States of the water of the Red River and its tributaries;

* * *

(e) To provide a basis for state or joint state planning and action by ascertaining and identifying each state's share in the interstate water of the Red River Basin and the apportionment thereof.

* * *

Section 2.01. Each Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state. Each state may freely administer water rights and uses in accordance with the laws of the state, but such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact.

* * *

Section 2.10. Nothing in this Compact shall be deemed to:

(a) Interfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, not inconsistent with its obligations under this Compact;

(b) Repeal or prevent the enactment of any legislation or the enforcement of any requirement by any Signatory State imposing any additional conditions or restrictions to further lessen or prevent the pollution or natural deterioration of water within its jurisdiction; provided nothing contained in this paragraph shall alter any provision of this Compact dealing with the apportionment of water or the rights thereto; or

(c) Waive any state's immunity under the Eleventh Amendment of the Constitution of the United States, or as constituting the consent of any state to be sued by its own citizens.

* * *

Section 4.02. Subbasin 2 - Intrastate and Interstate streams - Oklahoma.

(a) This subbasin is composed of all tributaries of the Red River in Oklahoma and portions thereof upstream to the Texas-Oklahoma state boundary at longitude 100 degrees west, beginning from Denison Dam and upstream to and including Buck Creek.

(b) The State of Oklahoma shall have free and unrestricted use of the water of this subbasin.

* * *

Section 5.03. Subbasin 3 – Interstate Streams – Oklahoma and Arkansas.

* * *

(b) The States of Oklahoma and Arkansas shall have free and unrestricted use of the water of this subbasin within their respective states, subject, however, to the limitation that Oklahoma shall allow a quantity of water equal to the 40 percent of the total runoff originating below the following existing, authorized or proposed last major downstream damsites in Oklahoma to flow into Arkansas:

			Location	
Stream	Site	Ac-ft	Latitude	Longitude
Little River	Pine Creek	70,500	34°06.8'N	95°04.9'W
Glover Creek	Lukfata	258,600	34°08.5'N	94°55.4'W
Mountain Fork River	Broken Row	470,100	34°08.9'N	94°41.2'W

* * *

Section 5.05. Subbasin 5 - Mainstem of the Red River and tributaries.

(a) This subbasin includes that portion of the Red River, together with its tributaries, from Denison Dam down to the Arkansas-Louisiana state boundary, excluding all tributaries included in the other four subbasins of Reach II.

(b) Water within this subbasin is allocated as follows:

(1) The Signatory States shall have equal rights to the use of runoff originating in subbasin

5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second.

(2) Whenever the flow of the Red River at the Arkansas-Louisiana state boundary is less than 3,000 cubic feet per second, but more than 1,000 cubic feet per second, the States of Arkansas, Oklahoma, and Texas shall allow to flow into the Red River for delivery to the State of Louisiana a quantity of water equal to 40 percent of the total weekly runoff originating in subbasin 5 and 40 percent of undesignated water flowing into subbasin 5; provided, however, that this requirement shall not be interpreted to require any state to release stored water.

(3) Whenever the flow of the Red River at the Arkansas-Louisiana state boundary falls below 1,000 cubic feet per second, the States of Arkansas, Oklahoma, and Texas shall allow a quantity of water equal to all the weekly runoff originating in subbasin 5 and all undesignated water flowing into subbasin 5 within their respective states to flow into the Red River as required to maintain a 1,000 cubic foot per second flow at the Arkansas-Louisiana state boundary.

(c) Whenever the flow at Index, Arkansas, is less than 526 c.f.s., the States of Oklahoma and Texas shall each allow a quantity of water equal to 40 percent of the total weekly runoff originating in subbasin 5 within their respective states to flow into the Red River; provided, however, this provision shall be invoked only at the request of Arkansas, only after

Arkansas has ceased all diversions from the Red River, itself, in Arkansas above Index, Arkansas, and only if the provisions of subsections 5.05(b)(2) and (3) have not caused a limitation of diversions in subbasin 5.

(d) No state guarantees to maintain a minimum low flow to a downstream state.

* * *

Section 6.03. Subbasin 3 – Interstate streams – Texas and Louisiana.

* * *

(b) Texas and Louisiana within their respective boundaries shall each have the unrestricted use of the water of this subbasin subject to the following allocation:

(1) Texas shall have the unrestricted right to all water above Marshall, Lake O' the Pines, and Black Cypress damsites; however, Texas shall not cause runoff to be depleted to a quantity less than that which would have occurred with the full operation of Franklin County, Titus County, Ellison Creek, Johnson Creek, Lake O' the Pines, Marshall, and Black Cypress Reservoirs constructed, and those other impoundments and diversions existing on the effective date of this Compact. Any depletions of runoff in excess of the depletions described above shall be charged against Texas' apportionment of the water in Caddo Reservoir.

(2) Texas and Louisiana shall each have the unrestricted right to use fifty (50) percent of the conservation storage capacity in the present Caddo Lake for the impoundment of water for

state use, subject to the provision that supplies for existing uses of water from Caddo Lake, on date of Compact, are not reduced.

(3) Texas and Louisiana shall each have the unrestricted right to fifty (50) percent of the conservation storage capacity of any future enlargement of Caddo Lake, provided, the two states may negotiate for the release of each state's share of the storage space on terms mutually agreed upon by the two states after the effective date of this Compact.

(4) Inflow to Caddo Lake from its drainage area downstream from Marshall, Lake O' the Pines, and Black Cypress damsites and downstream from other last downstream dams in existence on the date of the signing of the Compact document by the Compact Commissioners, will be allowed to continue flowing into Caddo lake except that any manmade depletions to this inflow by Texas will be subtracted from the Texas share of the water in Caddo Lake.

* * *

APPENDIX G

Oklahoma Statutes Annotated
Title 82. Waters and Water Rights

* * *

§ 105.12. Approval of application by Oklahoma Water Resources Board—Use of water outside the state

A. In order to protect the public welfare of the citizens of Oklahoma and before the Oklahoma Water Resources Board takes final action on the application, the Board shall determine from the evidence presented whether:

* * *

5. If the application is for use of water out of state, the Board shall, in addition to the criteria set forth in this subsection, also evaluate whether the water that is the subject of the application could feasibly be transported to alleviate water shortages in the State of Oklahoma.

If the evidence is determined to be sufficient, and subject to subsection B of this section, the Board shall approve the application by issuing a permit to appropriate water. The permit shall state the time within which the water shall be applied to beneficial use. In the absence of appeal as provided by the Administrative Procedures Act, the decision of the Board shall be final.

* * *

F. Permits and amendments that authorize the use of water outside the state shall be subject to review by the Board at least every ten (10) years after the date of issuance to determine whether there has

been a substantial or material change relating to any matters set forth in subsection A of this section. The Board may impose additional conditions as described by Board rules to address any such substantial or material change.

* * *

§ 105.12A. Permits to use water outside of state

* * *

D. No permit for the use of water out of state shall authorize use of water apportioned to the State of Oklahoma under an interstate compact unless specifically authorized by an act of the Oklahoma Legislature and thereafter as approved by it.

* * *

§ 105.16. Time for putting water to beneficial use

* * *

B. If, upon evidence presented to the Board, and considering the present and future needs of the stream system of origin, it appears that the proposed project, improvement or structure will promote the optimal beneficial use of water in the state, and it further appears that the total amount of water to be authorized by the permit cannot be put to beneficial use within seven (7) years, then the Board shall provide in the permit the time within which the total amount to be authorized shall be put to beneficial use. This time shall be the useful life of the proposed project, improvement or structure as found by the Board. In order to insure orderly progress toward total beneficial utilization within the said time set by the Board, the Board shall provide in the permit a schedule of times within which certain percentages of the total

amount to be authorized must be put to beneficial use.

* * *

§ 1085.22. Sale, transfer or lease of storage facilities

For the purpose of providing water for municipal, agricultural, industrial and other uses the Commission is required to sell, transfer or lease, in whole or in part, any acquired storage facilities including land or interests therein to any municipality, industry or other local interests, upon the request of the contracting party at the conclusion of the pay-out of the storage, except that any such party requesting title shall be responsible for the pro rata part of the maintenance and operation costs of such storage. In no event shall the Commission require any payment for such transfer in excess of the costs to the Commission of the construction and operation of the storage facility and the interest on obligations of the Commission. The Commission shall not permit the sale or resale of any water for use outside the State of Oklahoma. Where lands or interest therein are acquired by the Commission and not utilized for the purposes for which it was acquired, or which have been utilized but such utilization has ceased, then, after ten (10) years from the date of acquisition, or ten (10) years from the date utilization ceased, as the case may be, such land must be sold at public auction to the highest bidder; and mandamus by any interested party will be to require such sale.

* * *

§ 1086.1. Policy of state as to use of surplus and excess water—State water plan

A. All of the people have a primary interest in the orderly and coordinated control, protection, management, conservation, development and utilization of the water resources of the state. The people residing within areas where waters originate benefit from the optimum development and utilization of water within the area of origin. The people in water deficient areas benefit by being able to use excess and surplus waters. The policy of the State of Oklahoma is to encourage the use of surplus and excess water to the extent that the use thereof is not required by people residing within the area where such water originates. In order to maximize the alternatives available for the use and benefit of the public and water-user entities and for the use and benefit of the public and for the general welfare and future economic growth of the state, it is therefore the purpose of this act to provide means for the expeditious and coordinated preparation of a comprehensive state water plan and decennial updates thereof for submission to the Legislature providing for the management, protection, conservation, structural and nonstructural development and utilization of water resources of this state, in accordance with the following principles:

* * *

3. Water use within Oklahoma should be developed to the maximum extent feasible for the benefit of Oklahoma so that out-of-state downstream users will not acquire vested rights therein to the detriment of the citizens of this state;

§ 1324.10. Powers of district

* * *

B. No district organized hereunder shall sell or export water or gas pursuant to the Rural Water, Sewer, Gas and Solid Waste Management Districts Act outside of the state without consent of the Legislature.

* * *

APPENDIX H

OFFICE OF THE ATTORNEY GENERAL
STATE OF OKLAHOMA

Opinion No. 77-274

February 28, 1978

* * *

Considering these factors together, we consider the proposition unrealistic that an out-of-state user is a proper permit applicant before the Oklahoma Water Resources Board. We can find no intention to create the possibility that such a valuable resource as water may become bound, without compensation, to use by an out-of-state user.

* * *

Sincerely,

Larry Derryberry
Attorney General of Oklahoma

Amalija J. Hodgins
Assistant Attorney General

OPPOSITION BRIEF

RECORD
AND
BRIEFS

No. 11-889

In The Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,

Petitioner,

v.

RUDOLF JOHN HERRMANN, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Petitioner Tarrant Regional Water District's ("Tarrant's") description of the questions presented is inherently contradictory and can only charitably be viewed as alternative arguments. On the one hand, Tarrant relies on the federal Red River Compact as a basis for arguing that it can go across the state borders of Oklahoma and take water allocated to Texas under the Compact. On the other hand, Tarrant also argues that if the Compact is not given the interpretation it seeks, then the exclusive Congressional apportionments of water to Oklahoma should be declared invalid because they are precluded by the judicially-created dormant Commerce Clause as described in *Sporhase v. Nebraska*, 458 U.S. 941 (1982). Respondents respectfully submit that the following issues more accurately reflect what is at stake in this Petition:

1. Can the judicially-created dormant Commerce Clause be used by water users in one state to overturn the express Congressional apportionment of water contained in an interstate water compact, particularly in a case where none of the signatory states are parties?

2. If the dormant Commerce Clause does not invalidate the Congressional apportionment in the Compact, can this Court infer – solely from provision in the Compact which allocates water to the "signatory states" by granting them equal rights to the use

COUNTER-STATEMENT OF QUESTIONS PRESENTED – Continued

of water within a subbasin – that the Compact was intended to: (a) contradict other provisions of the Compact recognizing the primacy of state law within state boundaries and the right of a signatory state to use all of the waters within its boundaries, subject to downstream delivery requirements, and (b) allow Tarrant to take water allocated to Texas from within Oklahoma before it flows beyond Oklahoma's borders and is made available to the other signatory states?

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STATEMENT OF THE CASE

Tarrant's Statement of the Case fails to capture how narrow the issues are by giving short shrift to the only three applications that are the subject of the suit, by failing to properly identify the Oklahoma state laws that actually impact those applications, and by giving insufficient attention to the Red River Compact, Pub. L. No. 96-564, 94 Stat. 3305 (Dec. 22, 1980) (hereinafter "Compact").

A. Tarrant's Applications.

Tarrant filed three applications with the Oklahoma Water Resources Board ("OWRB") to appropriate water within Oklahoma and export it to end users in Texas. In the "Kiamichi River" Application, Tarrant sought a permit to appropriate water downstream of Hugo Lake on the Kiamichi River, a tributary of the Red River, in a stretch that is within Reach II, Subbasin 5 of the Compact. Court of Appeals Plaintiff's Appendix ("C.A. Pl. App.") 165-91. Under the "Cache Creek" and "Beaver Creek" Applications, Tarrant sought a permit to appropriate water from tributaries of the Red River within Reach I, Subbasin 2 of the Compact. C.A. Pl. App. 193-217.

Tarrant also filed an application with the Texas Commission on Environmental Quality for a permit to export the water contemplated by the Kiamichi Application and alleged to be apportioned to Texas. The TCEQ returned the application because its "Executive Director has determined that the [TCEQ]

does not have jurisdiction to process an application requesting a diversion of water from the Kiamichi River." C.A. Pl. App. 707; Court of Appeals Defendants' Appendix ("C.A. Defs. App.") 113.

B. The Red River Compact.

After more than twenty years of negotiation, the authorized representatives of the states agreed upon and adopted the Red River Compact. The transmittal letter from the Governor of Texas in support of the Compact's apportionment states: "We, in Texas, believe that adoption of the Red River Compact benefits our entire state. The Compact's equitable apportionment of water not only alleviates the possibility of interstate conflicts in the future, but also allows each state to *confidently anticipate the availability of water necessary for future municipal and industrial growth*." S. Rpt. 96-964 (96th Cong., 2d Sess. Sept. 18, 1980) (emphasis added). Congress reviewed the Compact, waived the United States' sovereign immunity so that its provisions could be reviewed in the federal courts, and adopted the Compact, making it federal law.

To accomplish the apportionment of water to each of the four states, the Compact separates the Red River and its tributaries into five reaches, and then into subbasins within each reach. Tarrant's Beaver and Cache Applications propose taking water from Reach I, Subbasin 2, which is allocated exclusively to Oklahoma: "The State of Oklahoma shall have free and unrestricted use of the water of this subbasin."

Compact, Art. IV, § 4.02(b). The bulk of Tarrant's Petition is devoted to its Kiamichi Application, which proposes to appropriate water from Reach II, Subbasin 5. Reach II is the only reach involving all four states. Although there are five subbasins within Reach II, there are two fundamentally different types of subbasins: those upstream of the last major downstream reservoirs on the tributaries (Subbasins 1-4), and the remaining subbasin downstream of the last major downstream reservoir (Subbasin 5). Water in the upstream subbasins is allocated between the states involved: Subbasin 1 is apportioned to Oklahoma; Subbasins 2 and 4 are apportioned to Texas; and Subbasin 3 is divided between Oklahoma and Arkansas. Compact, Art. V, § 5.01(b), 5.02(b), 5.03(b) & 5.04(b).

The Compact allocates water in Subbasin 5 in an entirely different manner in order to provide for a certain flow of the Red River at the Arkansas-Louisiana border while reserving rights of individual states to use a portion of that water under certain conditions. In Subbasin 5, each state is allocated the use of water downstream of the last major downstream damsite provided that such use does not prevent the Red River from passing 3,000 cfs past the Arkansas-Louisiana border. If the flow falls below 3,000 cfs, each state agrees to curtail its use and allow a certain percentage of the flow within its border to pass to Louisiana.

As Tarrant argued extensively and repeatedly below, *see* C.A. Pl. App. 569, 1299, water from Reach II, Subbasin 5 does not flow from Oklahoma to Texas.

Thus, the Compact does not attempt to apportion water in this reach between just those two states. Instead, it apportions water in this subbasin between the predominately upstream states (Oklahoma, Texas and Arkansas) and the predominantly downstream state, Louisiana. The allocations in Reach II require that water in Subbasin 5 be released to Louisiana and Arkansas when flows are low, but allow each state to divert water for its own use in its state subject to that flow regime. More importantly, the Compact allows the upstream states to retain water in their reservoirs which define the boundaries of Subbasin 5, regardless of the amount of water Louisiana receives from the Red River.

To avoid doubts about the bargain struck by the States, the Legal Advisory Committee to the Red River Compact Commission prepared "Supplemental Interpretive Comments" to the Red River Compact "so that members of the respective legislatures, Congressional committees, Federal agencies, and subsequent compact administrators might be apprised of the intent of the Compact Negotiating Committee with regard to each Article of the Compact." C.A. Pl. App. 419. The Interpretive Comments note:

> Although this compact will be state law in each of the four Signatory States, it is not intended to interfere with any state's internal administration of water and/or water rights. Subject to the general constraints of water availability and the apportionment of the Compact, each state is free to continue its

> existing internal water administration, or to modify it in any manner it deems appropriate. *Even during periods of water shortage when the Compact may require an upstream state to take affirmative steps to assure water deliveries, no attempt is made to specify the steps that will be taken*; it is left to the state's internal water administration. Sections 2.01, 2.05, 2.10 and 2.14 each, at least in part, are intended to insure that the states' internal autonomy is not displaced by the Compact.

C.A. Pl. App. 422 (emphasis added). The language of the remainder of the Red River Compact provides further context for the parties' intent when they "allocated" water to a state. The following Compact provisions are explicit:

- "The principal purposes of this compact are: . . . (e) To provide a basis for state or joint state planning and action by ascertaining and identifying each state's share in the interstate water of the Red River Basin and the apportionment thereof." Art. I, § 1.01.

- "Each Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state. Each state may freely administer water rights and uses in accordance with the laws of that state, but such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact." Art. II, § 2.01.

- "The failure of any state to use any portion of the water allocated to it shall not constitute relinquishment or forfeiture of the right to such use." Art. II, § 2.04.
- "Nothing in this Compact shall be deemed to . . . [i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, not inconsistent with its obligations under this Compact." Art. II, § 2.10.

Tarrant mischaracterizes as waste the water Oklahoma allows to flow into Subbasin 5 and then downstream into Arkansas and Louisiana to maintain adequate flows for navigation, and protect water quality in the mainstem and estuaries. Certainly, it is unlikely that Arkansas and Louisiana consider it so, as Oklahoma's abundant flows downstream help ensure the minimum flows to Louisiana as required by the Compact. This benefits Texas by helping to augment the minimum flow at the Louisiana border, allowing Texas to divert water within its portion of Subbasin 5. In fact, Texas has not complained of any shortage of water allocated to it by the Compact. Herman Settlemeyer, the engineering advisor to the Texas State Red River Compact Commission, testified in his deposition that Texas has received its full compact allotment for at least the years 2005-2009. C.A. Defs. App. 29-34; 56-63.

C. Relevant Oklahoma State Law.

Tarrant attacks a mass of legislation and other materials of Oklahoma law, without regard for the effect (if any) that legislation actually has on its pending applications. Although Tarrant identified a "public policy" from Okla. Stat. tit. 82, § 1086.1(A)(3), it did not seek any actual relief from this non-coercive declaration of public policy. As Tarrant now concedes, the two statutes making up the alleged moratorium have expired of their own accord and cannot apply to Tarrant's three pending applications or allegedly planned future attempts to export water. *See* Okla. Stat. tit. 82, § 1B (expired Nov. 1, 2009); Okla. Stat. tit. 74, § 1221.A (expired June 6, 2007, prior to the filing of this lawsuit).

Tarrant has apparently abandoned its objections to some laws (*e.g.*, Okla. Stat. tit. 82, § 1266.9), and several others do not apply on their face to any of Tarrant's pending applications. For example, Okla. Stat. tit. 82, § 1085.2(2), does nothing more than grant the OWRB authority to make contracts to carry out its functions. Tarrant has not alleged that it seeks a "contract" from the OWRB to export water to Texas. Similarly, Okla. Stat. tit. 82, § 1324.10(B) precludes a Rural Water, Sewer, Gas and Solid Waste Management District from selling or exporting water or gas outside the state without legislative consent. Tarrant has not even alleged that it attempted to negotiate the purchase of water from such a district. Okla. Stat. tit. 82, § 1085.22 applies to the Oklahoma Water Conservation Commission and governs only "acquired

storage facilities" owned or operated by the Commission. Tarrant does not propose taking *any* water from any reservoir, much less from an "acquired storage facility" subject to this provision.

Tarrant asks this Court to speculate that Okla. Stat. tit. 82, § 105.16(A) might apply to its Applications. That section requires that the full amount of water under a permit be put to beneficial use within seven years, but allows a different schedule if the OWRB concludes the proposed project "will promote the optimal beneficial use of water in the state." Tarrant has not, however, alleged or demonstrated that it is unable to place the water it seeks to export to beneficial use within seven years. Further, this section would not apply to the decision whether to grant Tarrant's three applications, the factual predicate to this litigation.

The final category of legislation targeted by Tarrant are the various components that make up HB 1483, enacted during the pendency of this litigation and constituting the only provisions of Oklahoma state law relevant to any of Tarrant's applications. C.A. Pl. App. 534-38. The Act created a new provision, Okla. Stat. tit. 82, § 105.12A, and amended the existing section codified at Okla. Stat. tit. 82, § 105.12.

The new Section 105.12A reiterates Oklahoma's commitment to "the conservation and preservation of its public waters and the necessity to maintain adequate supplies for the present and future water requirements of the state and to protect the public

welfare of its citizens" and notes that Oklahoma "entered into interstate compacts for that purpose." Okla. Stat. tit. 82, § 105.12A(A). It also prohibits the OWRB from issuing a permit that would "[i]mpair the ability of the State of Oklahoma to meet its obligations under any interstate stream compact," Okla. Stat. tit. 82, § 105.12A(B)(1), and prohibits any permit "for the use of water out of state" if that water was "apportioned to the State of Oklahoma under an interstate compact" unless that use was authorized by an act of the Oklahoma Legislature. Okla. Stat. tit. 82, § 105.12A(D). Thus, this legislation itself refutes Tarrant's allegation that "[t]here is no dispute that the practical upshot of Oklahoma's restrictive permitting scheme is categorically to prevent out-of-state applicants from obtaining a license to receive water located in Oklahoma for out-of-state use." Petition at 9. Instead, it recognizes the possibility of such a permit.

The existing Section 105.12 was revised to allow the exportation of water under certain conditions. First, the revision added a new requirement for the evaluation of any application to export water: "whether the water that is the subject of the application could feasibly be transported to alleviate water shortages in the State of Oklahoma." Okla. Stat. tit. 82, § 105.12(A)(5). The revision also includes certain procedural prerequisites for exported water applications. Okla. Stat. tit. 82, § 105.12(D), (E) & (F).

REASONS FOR DENYING THE PETITION

I. THIS CASE PRESENTS NO ISSUES THAT REQUIRE FINAL RESOLUTION BY THIS COURT.

Tarrant, in an attempt to compel access to water allocated to Oklahoma under the Compact for export to Texas, would have this Court address two lines of result-oriented and alternative argument. On the one hand, Tarrant argues that the Congressionally-approved Compact affords it the right to go into Oklahoma and divert Texas water from within rivers located in Oklahoma. On the other hand, Tarrant argues that if its interpretation of the Compact is not correct, then the Compact is invalid because it is inconsistent with the dormant Commerce Clause as interpreted in *Sporhase v. Nebraska*, 458 U.S. 941 (1982).

Starting with an argument based on the validity of the Compact (as opposed to its invalidity), Tarrant asks the Court to grant Certiorari in order to interpret a single phrase appearing in one subsection of the Red River Compact. Tarrant argues that the phrase "equal rights" vitiates all other purposes of the Compact and allows Tarrant to divert water compacted to Texas from a point of diversion within the state borders of Oklahoma. As discussed below, the interpretation of this singularly unique phrase found in no other interstate compact cannot form the basis for review on Certiorari. However, Tarrant argues that if its interpretation is not correct, then the express Congressional purposes of the Compact to allocate

water exclusively among the States should be held to violate the principles imbedded in the so-called "dormant Commerce Clause." Certainly, this latter proposition does not form the basis for Certiorari review, in that it is frivolous on its face and if accepted would undercut every extant interstate compact allocating water among States.

This case is not a controversy among States over the meaning of an interstate compact. Rather, it involves a controversy between a state water permitting authority – OWRB – and a water utility in Texas. Remarkably, the four signatories to the Compact – the States of Oklahoma, Texas, Arkansas and Louisiana – are not parties to the litigation, even though all would have a direct interest in an interpretation of the Compact, and would like to weigh in on Tarrant's arguments that the dormant Commerce Clause precludes exclusive allocations of water among states. *Cf. South Carolina v. North Carolina*, 130 S. Ct. 854 (2010); *Hood v. Memphis*, 570 F.3d 625 (5th Cir. 2009).

The absence of the Compacting States is striking. Tarrant now argues that the interpretation of two words in the Red River Compact is a case of great significance to all States with interstate compacts, but, it made the exact opposite argument in all of the other forums. Indeed, Tarrant had the opportunity to join the Compacting States, but it resisted doing so. *Tarrant Regional Water Dist. v. Herrmann*, 2007 WL 3226812 (W.D. Okla. 2007). Tarrant had the opportunity to allow the matter, as one implicating the

affected Compacting States, to be resolved before the Red River Compact Commission, but resisted doing so. App. 59a-61a. The Compact has a unique jurisdictional provision that would have permitted joinder of the States. Compact, Art. XIII, Sec. 13.03.

But Tarrant insisted throughout that no compact interpretation issues were raised that would affect the Compacting States or other comparable states with compacts. Rather, the issue was whether the Compact, as a federal law, preempted an Oklahoma statute that would preclude Tarrant from diverting water within Oklahoma that was allegedly allocated to Texas. Now, having persuaded the District Court and the Tenth Circuit Court of Appeals that the case was a narrow one, was of no national significance, did not implicate the Compacting States, and that it could be resolved locally as a *sui generis* dispute between two competing non-state entities, Tarrant finds itself dissatisfied with the result. In this Court, Tarrant reverses ground entirely, and proclaims that the Tenth Circuit opinion, if left intact, would implicate relationships among Compacting States nationwide and would undercut the policies of *Sporhase* that it argues somehow deny Congress the power to allocate water exclusively among states. The former basis for Certiorari is insufficient on its face because of the narrow nature of the dispute. The second argument, that the dormant Commerce Clause controls over Congressionally-approved compacts, is frivolous.

Tarrant is incorrect when it argues that the legal proposition adopted by the Court of Appeals – that

compacts apportion and allocate water among states in perpetuity – is a novel one and would disrupt the national body politic. The exact opposite is true. Every case from this Court apportioning water among states does so in order to finally determine the quantity of water that can be maintained by each state for each future use. *E.g.*, *Kansas v. Colorado*, 206 U.S. 46, 99-100 (1907) (Arkansas River); *Wyoming v. Colorado*, 259 U.S. 419 (1922), *decree modified*, 260 U.S. 1 (1922), *new decree entered*, 353 U.S. 953 (1957) (Laramie River); *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *decree modified*, 345 U.S. 981 (1953), *settlement entered, Nebraska v. Wyoming and Colorado*, 534 U.S. 40 (2001) (North Platte River); *Colorado v. New Mexico*, 459 U.S. 176 (1982) (Vermejo River), *appeal after remand*, 467 U.S. 310 (1984). Every case from this Court interpreting interstate compacts has done so as to clarify the quantity of water apportioned to each Compacting State and to determine whether another state has illegally attempted to take water apportioned to another state. *Kansas v. Colorado*, 514 U.S. 673 (1995) (Arkansas River); *Oklahoma v. New Mexico*, 501 U.S. 221 (1991) (Canadian River); *Montana v. Wyoming*, 131 S. Ct. 1765 (2011) (Yellowstone River); *Hinderlider v. La Plata Co.*, 304 U.S. 92, 106 (1938). This Court has enforced compacts' water allocations to States' exclusive use and regulation to the point of ordering that money damages be paid to compensate a State for short deliveries. *Texas v. New Mexico*, 482 U.S. 124, 128-33 (1987) (Pecos River Compact); *Kansas v. Colorado*, 533 U.S. 1, 7 (2001) (Arkansas River Compact of 1949).

The literature discussing the importance of interstate compacts has concluded that the primary purpose – indeed the sole purpose – of an interstate water compact is to allow each state to know how much water of an interstate stream is allocated to it. Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution – A Study in Interstate Adjustments*, 34 Yale L.J. 685, 718 (1925); Julius M. Friedrich, *The Settlement of Disputes between States Concerning Rights to the Waters of Interstate Streams*, 32 Iowa L. Rev. 244, 278 (1947); J. David Pringe, *State Control of Great Lakes Water Diversion*, 16 Wm. Mitchell L. Rev. 107, 158 (1990). Typical is the view of Professor Trelease:

> Economic protectionism is the very purpose of the compact. The split of unappropriated water is intended to free the states from the need to race for the water under the usually applied (though recently questioned) rule of *Wyoming v. Colorado*: 'priority is equity' between two states that apply the law of prior appropriation internally, and the same law will fix their shares in an equitable apportionment. A compact halts the race. Each state is given a fund of water free from the priorities of the other, each can develop at its own pace, and the slower state is protected from a complete takeover of the joint resource by the faster. To allow the faster state to overreach its allotment and eat into the other's in the name of interstate commerce would drain of all force the 'legal expectation' given by the compact.

Frank J. Trelease, *State Water and State Lines: Commerce in Water Resources*, 56 U. Colo. L. Rev. 347, 349 (1985).

In short, there is no unsettled proposition that needs to be resolved by this Court. It is settled beyond question that compacting States intend to apportion water among themselves in perpetuity by compacts. When Congress approves these water compacts, it exercises its affirmative power under the Compacts Clause and the Commerce Clause to approve this permanent allocation. Because this case raises no unsettled question of federal law, the granting of a Writ of Certiorari would not be appropriate.

Moreover, Tarrant's burden for invoking this Court's review of the Red River Compact's allocation and affirmation of State control of water resources is extraordinary. This Court will not rewrite interstate compacts, *Texas v. New Mexico*, 462 U.S. 554, 564 (1983), and "will not exert its extraordinary power to control the conduct of one state at the suit of another unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence." *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931) (citing *New York v. New Jersey*, 256 U.S. 296, 309 (1921)); *Missouri v. Illinois*, 200 U.S. 496, 521 (1906). *See also Idaho v. Oregon*, 462 U.S. 1017, 1027 (1983). While Tarrant invokes its ardent desire for "new sources of water" for north-central Texas, the State of Texas – the actual Compact signatory – has not complained of any shortage of water allocated to it by the Compact. If the Court would not review the

matter for Texas, *a fortiori*, it should not do so for a political subdivision of a state.

Even if it were unsettled whether interstate water compacts in general, and the Red River Compact in particular, apportion and allocate water among Compacting States in perpetuity, Certiorari would not be appropriate. Resolution of this case would not bind the Compacting States. Certainly a decision among two non-state parties should not be the forum for re-opening almost one hundred years of case law regarding interstate compacts. And whatever the result, in this case, it is clear that the matter would come back before the Court in a controversy where the Compacting States consider the matter to be of such significance that it requires resolution by this Court. Only in the context of such a controversy between states, were there an open question of the character of the Compact's apportionment, could it properly be resolved.

Tarrant's citation to *Sporhase* to support the alleged "dormant Commerce Clause" infirmity of Oklahoma statutes promulgated under the express authority of the Compact likewise provides no basis for review by this Court. As discussed *infra*, that argument is specious. The *Sporhase* facts are unique, in that there was no interstate compact governing the water at issue because it was not part of any interstate stream or river. Rather, it involved an attempt to transport un-compacted groundwater from Nebraska into Colorado under a complex of Nebraska statutes that precluded transport of that groundwater.

Contrary to Petitioners' Questions Presented, this Court has not "held on numerous occasions that a State may not discriminate against interstate commerce in water absent an 'expressly stated' or 'unmistakably clear' congressional intent to immunize the relevant state laws from dormant Commerce Clause scrutiny."

In fact, this Court's only decision involving interstate commerce in water and the effect of the dormant Commerce Clause is *Sporhase*. Furthermore, as noted above, every case considering the matter has held the States, with the approval of Congress, have the authority to allocate water among themselves, free from the strictures of any judicially-created doctrine that would apply had Congress not acted. In no case interpreting an interstate compact, or assessing damages against one state for taking the other's water in violation of a compact, has the Court cited the dormant Commerce Clause as a barrier. Opening up this uninterrupted line of cases at the behest of Tarrant would not be appropriate and would certainly be unwise.

The only other alleged error in the Court of Appeals' opinion for which Certiorari is sought is its interpretation of the phrase "equal rights." But, this language occurs in no other compact in the United States. Leaving intact the Tenth Circuit's careful preemption analysis of the Compact's Section 5.05 will not create any uncertainty regarding other compacts' similar provisions – there being none – nor affect their construction. Furthermore, reading into such a

phrase the right of one state to go into another state and divert compacted water would have tremendous policy significance and would, at a minimum, require that this be done when the affected states can weigh in on the question.

Rather than rely on vague language of "equal rights," when Compacting States and Congress have intended to allow appropriators of one signatory state to establish points of diversion in another signatory state, the states have inserted explicit cross-boundary provisions in the compact, including detailed provisions governing the means for establishment of the diversion, the application of local law, and the compact accounting for measuring water so diverted. The Upper Colorado River Basin Compact, 63 Stat. 31 (April 6, 1949), seems to have served as a model for such provisions.[1] Similar language appears in the Yellowstone River Compact, 63 Stat. 152; 65 Stat. 663 (Oct. 30, 1951),[2] in the Snake River Compact, 62 Stat. 294; *amended* 64 Stat. 29 (Mar. 21, 1950),[3] and in the Bear River Compact, 72 Stat. 38; 94 Stat. 4 (Mar. 17, 1958).[4]

Many other compacts, including several wherein Texas is a signatory state, expressly establish the

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[1] *See* Article IX; Article XI(a)(iv) (apportioning the Little Snake River); Article XII (apportioning Henry's Fork of the Green River).

[2] *See* Article VII; Article VIII.

[3] *See* Article VIII(A).

[4] *See* Article VIII(A); Article VIII(B).

prerogative of a downstream state to construct diversions or storage within an upstream state, and provide the regulatory mechanism and procedures according to which such a cross-boundary diversion should be approved and administered. The Rio Grande Compact, 53 Stat. 785 (May 31, 1939), between Texas, New Mexico and Colorado, for example, establishes New Mexico's delivery point to Texas within the State of New Mexico,[5] and it further provides that if the State of New Mexico "decides to construct the necessary works for diverting the waters of the San Juan River, or any of its tributaries, into the Rio Grande, Colorado hereby consents to the construction of said works and the diversion of waters from the San Juan River [within Colorado] . . . provided the present and prospective uses of water in Colorado by other diversions from the San Juan River, or its tributaries, are protected."[6] The Pecos River Compact, 63 Stat. 159 (June 9, 1949), between Texas and New Mexico similarly provides, "No reservoir shall be constructed and operated in New Mexico above Avalon Dam for the sole benefit of Texas unless the Commission shall so determine."[7] The Sabine River Compact between Texas and Louisiana empowers the Compact Administration "[t]o record and approve all points of diversion at

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[5] *See* Article IV, originally at San Marcial, later changed to Elephant Butte Reservoir by Compact Commission Resolution (Feb. 22-24, 1948).

[6] Article IX.

[7] Article IV(f).

which water is to be removed from the Sabine River or its tributaries below the Stateline; provided that, in any case, the State agency charged with the administration of the water laws for the State in which such point of diversion is located shall first have approved such point for removal or diversion."[8]

Other compacts entered into by Oklahoma and another Red River Compact signatory contain provisions accommodating downstream states' interests in the future election to seek points of diversion within an upstream state. Article VII of the Arkansas River Compact of 1965, 89 Stat. 1409 (Nov. 7, 1966) between Kansas and Oklahoma directs the Compact Commission to "determine the conditions under which one state may construct and operate for its needs new conservation storage capacity in the other state," further providing this new capacity is to be "charged against the state in which the use is made." Article VI of the later Arkansas River Basin Compact, 87 Stat. 569 (Nov. 13, 1973) between Oklahoma and Arkansas allows each State to "construct, own and operate for its needs water storage reservoirs in the other State" and grants to each State "the free and unrestricted right to utilize the natural channel of any stream within the Arkansas River Basin for conveyance through the other State of waters released from any water storage reservoir for an intended downstream point of diversion or use." Still other interstate water

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[8] Article VII(g)(5).

compacts contain more extensive provisions detailing regulatory, physical, financial and water accounting specifications and procedures in the event one compacting State seeks a cross-boundary diversion or storage to accomplish the apportionment directed elsewhere in the compact.[9]

Because the Compacting States were not parties to this case, it is simply a contracts case regarding specific language. This Court has correctly held that in addition to being federal law, interstate compacts are contracts. *Montana v. Wyoming*, 131 S. Ct. 1765, 1772 n.4 (2011). Based upon the entire record from the District Court, the Tenth Circuit was asked to interpret the singular and unique phrase – "equal rights" – to determine its intended purpose within the Compact's scheme of apportionment. It did so thoroughly and thoughtfully and bound the parties that came before it. It is not the role of this Court to grant

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[9] These include the South Platte River Compact, Art. V(1)-(3), Art. VI(1)-(6), 44 Stat. 195 (March 8, 1926), between Colorado and Nebraska, the Republican River Compact, Art. VI-VII, 57 Stat. 86 (May 26, 1943), between Kansas, Nebraska and Colorado, the Belle Fourche River Compact, Art. VI, 58 Stat. 94 (Feb. 26, 1944), between South Dakota and Wyoming, the Costilla Creek Compact, Art. III(2), 60 Stat. 246 (1963); 77 Stat. 350, between Colorado and New Mexico, the Snake River Compact, Art. VII, VIII, XI, 62 Stat. 294; 64 Stat. 29, between Idaho and Wyoming, the Yellowstone River Compact, Art. VII-IX, 63 Stat. 152; 65 Stat. 663 (Oct. 30, 1951) between Montana, North Dakota, and Wyoming, and the Klamath River Compact, Art. V(A), VI(A), 69 Stat. 613; 71 Stat. 497 (Aug. 30, 1957), between California and Oregon.

Certiorari to review every disagreement by a party with an interpretation of a contract rendered by a district court familiar with the record or by a Circuit Court of Appeals affirming a district court. It clearly should not do so here.

II. CONGRESSIONAL APPROVAL OF THE RED RIVER COMPACT PRECLUDES APPLICATION OF THE DORMANT COMMERCE CLAUSE DOCTRINE.

In passing the Compact, Congress approved a perpetual allocation to Oklahoma of water from the Red River. Tarrant argues that it is an open question whether a federal court could undo that allocation relying on the judicially-created dormant Commerce Clause. That doctrine should never be held to displace express legislation taking action regulating commerce among the States. Such a holding would create a separation of powers dispute beyond the wildest conception of the framers.

There is no question that compacts are federal law, and "congressional consent transforms an interstate compact within [the Compact Clause of the federal constitution] into a law of the United States" such that the construction of such an agreement "presents a federal question." *Cuyler v. Adams*, 449 U.S. 433, 438 (1981); *see also NYSA-ILA Vacation & Holiday Fund v. Waterfront Commission*, 732 F.2d 292, 298 (2d Cir. 1984). As the *Cuyler* Court noted, "The requirement of congressional consent is at the heart

of the Compact Clause. By vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority." *Cuyler*, 449 U.S. at 439-40. The "full and free exercise of federal authority" is particularly relevant to interstate compacts apportioning water among the states.

Because the Red River Compact is federal law, as a matter of logic and law it cannot itself violate the dormant Commerce Clause. *Intake Water Company v. Yellowstone River Compact Commission*, 590 F. Supp. 293 (D. Mont. 1983), *aff'd*, 769 F.2d 568 (9th Cir. 1985); *People ex rel. Simpson v. Highland Irr. Co.*, 917 P.2d 1242, 1249 n.8 (Colo. 1996). The dormant Commerce Clause was said to fill in the "great silences" in the commerce clause. *Hood and Sons v. DuMond*, 336 U.S. 525 (1949). When Congress allows the clause to remain dormant, action is required by this Court. When Congress approves a compact, however, it breaks its silence, and replaces dormancy with action. In that case, the dormant Commerce Clause has no purpose. *Cf. New York State Dairy Foods, Inc. v. Northeast Dairy Compact Commission*, 198 F.3d 1, 9 (1st Cir. 1999).

Moreover, since at least 1891, the United States Supreme Court has recognized that Congress has plenary authority to enact legislation that authorizes the states to burden interstate commerce in a way

that would otherwise violate the dormant Commerce Clause. *See In re Rahrer*, 140 U.S. 545, 561 (1891). The cases following this basic rule are legion. *See, e.g., James Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311 (1917); *Whitfield v. Ohio*, 297 U.S. 431, 438 (1936); *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 434 (1946); *Western & Southern Life Ins. Co. v. State Board of Equalization of California*, 451 U.S. 648, 652-53 (1981) (citing *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980)); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154-55 (1981); *Northeast Bancorp, Inc. v. Bd. of Governors of the Federal Reserve System*, 472 U.S. 159, 174 (1985); *Southwest Air Ambulance, Inc. v. City of Las Cruces*, 268 F.3d 1162, 1177 (10th Cir. 2001).

Congress can preclude the application of the dormant Commerce Clause indirectly, by authorizing the states to forge their own discriminatory regulation, or it can do so directly, by mandating that states take certain actions with respect to movement of goods in commerce. In the latter case, once Congress has acted, it is of no importance whether such state action might have been prohibited in absence of the Congressional mandate. An example of the indirect approach is explored in *Prudential Ins. Co.*, 328 U.S. at 434. The McCarran Act at issue in that case provided: "The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that

silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011. The best example of a direct Congressionally-mandated approach is the Congressionally-approved interstate compact. The Red River Compact, for example, expressly allocates water to Oklahoma that is not available in commerce to Texas, and allocates water to Texas that is not available in commerce to Oklahoma.

Litigation arises when Congress has not legislated directly on the issue and states attempt to argue, solely by inference, that Congress displaced the dormant Commerce Clause as to that subject matter. *Sporhase v. Nebraska*, 458 U.S. 941 (1982), and *South-Central Timber v. Wunnicke*, 467 U.S. 82 (1984), both represent failed attempts by States to make such an inferential leap. In each, Congress had not legislated on the specific subject at issue. Unlike *Prudential Ins. Co.*, there was no federal disclaimer of interest that purported to authorize the challenged state regulation of the relevant segment of commerce. Unlike this case, there was no federal adoption of a compact allocating the resources at issue. In the absence of express legislation, the defenders of the discriminatory state laws were forced to *infer* that Congress *would have* authorized the challenged state regulation.

In *Wunnicke*, the party looked to federal regulations and policy governing timber resources on *federal* lands to support an inference of consent to Alaska's similar regulation of timber on *state* lands. In

Sporhase, the state looked, *inter alia*, to the Reclamation Act, the Desert Lands Act, and to interstate water compacts *in general* to support an inference that Congress would have deferred to state regulation of the groundwater at issue were it to pass legislation on the subject. In both cases, the issue was what Congress would do if it chose to act in the future, not what Congress had done when it enacted specific legislation such as an interstate compact. Because there was no federal law directly addressing the alleged local preference for a resource, this Court required that the evidence be "expressly stated" or "unmistakably clear" before it would infer the intent of Congress to allow protectionist legislation. Neither *Sporhase* nor *Wunnicke* held or even suggested that a Congressionally-approved interstate water compact itself, the essential provisions of which *apportion* water and affirm State regulation thereof, must meet a talismanic "unmistakably clear" requirement in order for the State regulation to escape invalidation. Rather, because Congress has acted, the seminal test articulated in *M'Culloch v. Maryland*, 17 U.S. 316, 421 (1819) ("Let the end be legitimate. . . ."), remaining viable to this day, forms the basis for review. All reliance on *Sporhase* or *Wunnicke* as controlling precedent is misplaced, because neither interpreted an express mandate regulating interstate commerce.

Indeed, to the degree this Court addressed in *Sporhase* what might have happened had there been an interstate compact allocating Nebraska exclusive ownership over a portion of its groundwater, it made

it clear that there would have been an opposite result. *Sporhase*, 458 U.S. at 956 (noting that the "legal expectation" that States may restrict water within their borders has been advanced "by the negotiation and enforcement of interstate compacts. Our law therefore has recognized the relevance of state boundaries in the allocation of scarce water resources.").

Congress unquestionably had the authority to adopt the Red River Compact as federal law, and the express purpose of the Compact was to allocate water among the states outside the interstate water market. Even were *Sporhase* and *Wunnicke* considered relevant, the Compact makes it "unmistakably clear" that one of its "principal purposes" is to "provide a basis for state or joint state planning and action by ascertaining and identifying *each state's share* in the interstate water of the Red River Basin and the apportionment thereof." Art. I, § 1.01(e). It explicitly provides that "[e]ach Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state. Each state may freely administer water rights and uses in accordance with the laws of that state, but such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact." Art. II, § 2.01. Even a state's non-use of water allocated to it is protected by the Compact: "The failure of any state to use any portion of the water allocated to it shall not constitute relinquishment or forfeiture of the right to such use." Art. II, § 2.04. If these provisions were not clear enough, the Compact further provides: "Nothing

in this Compact shall be deemed to . . . [i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, not inconsistent with its obligations under this Compact." Art. II, § 2.10. Given the clarity of the Compact, *Sporhase* and *Wunnicke* are inapposite in every respect.

III. TARRANT'S ARGUMENT THAT THE COMPACT NEGOTIATORS AND CONGRESS INTENDED THAT TEXAS COULD TAKE ITS SHARE OF COMPACTED WATER WITHIN OKLAHOMA IS UNSUPPORTED BY ANY RATIONAL READING OF THE COMPACT.

Tarrant vehemently argued that the Compact apportioned no water to any Compacting State. But, correctly anticipating this argument would be rejected out of hand, Tarrant pivots. Tarrant now argues that not only did the Compact exclusively apportion water to Texas, it intended that Texas could come into Oklahoma and take its apportionment within Oklahoma. This argument makes little sense, and the resolution of this simple question of statutory intent surely cannot form the basis for Certiorari review by this Court. The parties negotiated for twenty years. In all compacts, almost unanimously, the purpose is to allow one state to divert its water within its state and the other to do so within the other state. Accordingly, had it been the intent for Texas to be allowed to go into Oklahoma and take its share of compacted

water, the Compact would have specifically allowed for this. To suggest, as Tarrant does, that the right to cross the state boundary and divert water can be inferred flies in the face of history and is inconsistent with the language of virtually every other interstate water compact. As discussed *supra*, when it is intended that one state can take its share from within another state, the operative language is explicit. Compacting States intending to establish exceptions to the rule and allow cross-boundary diversions have without fail set out the right to take water in another state in compact provisions with great specificity and precision. Certainly, in no compact is a cross-boundary diversion prerogative created with the bare phrase, "equal rights to the use of runoff." Compact, Section 5.05(b)(1). Such a right should not be inferred here.

Tarrant argued that this bare phrase preempts Signatory States' exercise of regulatory control within their boundaries and authorizes Texas users to access Texas's share of excess runoff within Oklahoma, despite the contrary reaffirmation of State control within the same Compact Section and the general "call for pronounced deference to, not displacement of, state water laws" expressed throughout the Compact. App. 41a.[10] The Tenth Circuit conducted a meticulous

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[10] In particular, Section 2.01 provides, "Each state may freely administer water rights and uses in accordance with the laws of that state," and Section 2.10 affirms that "Nothing in this Compact shall be deemed . . . to . . . [i]nterfere . . . within its boundaries the appropriation, use, and control of water . . . not

(Continued on following page)

interpretation and preemption analysis of Section 5.05(b)(1)'s "equal rights" provision in the context of the policy and purpose expressed throughout the Compact, and in Section 5.05 and its Interpretive Comment in particular. The court held that, taken together, Section 5.05's provisions "stand for the principle that the upstream states control the water within their boundaries, provided they meet their minimum flow obligations to downstream states and do not take more than an equal share of the excess water." App. 39a. Tarrant's proffered interpretation "attempts to read more into § 5.05(b)(1) than this provision was meant to or can support." App. 42a.

This is clearly right. In Reach II, Subbasin 5, the Compact "*allocate*[*s*]" the water by giving the "Signatory *States*" (emphasis added) "equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5." Art. V, § 5.05(b)(1). Tarrant reads this section not to allocate and reserve water for the individual states (despite the express use of the word "allocated" in the text) but rather to give the states, and particularly Texas, the right to disregard state boundaries and access their respectives shares of Subbasin 5 water within other Compact states. However, there can be no other meaning when the Compact "allocate[s]" the use of water to a particular "state" than that it is for that state's

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inconsistent with its obligations under this Compact." The court read the latter "to caution against reading preemption into the Compact's other provisions." App. 35a.

exclusive in-state use. Had it been the intent of the Compact drafters to allocate the water located within Oklahoma to Texas, after twenty years of negotiations, surely they would have said so, and the Interpretative Comments would have highlighted this dramatic shift of sovereignty to Texas.

Instead, this section compacts to each individual state the authority to retain and use water in Subbasin 5 within its borders when flow conditions downstream are met. The phrase "equal rights" simply means that within this subbasin, each state can authorize the use of water within the state, but, ultimately, its use cannot exceed an amount equal to what is used by other states. To decide otherwise effectively deprives the phrase "[w]ater in this subbasin is *allocated* as follows" (emphasis added) of any meaning. The waters of the subbasin within Oklahoma, for example, are not "allocated" to Oklahoma, if Texas can simply come into Oklahoma and take its share from the Oklahoma portion of the subbasin. Such an interpretation would also ignore the plain language of the Compact that allocates the "equal rights to the use of [water]" to the signatory states *qua* states.

The Compact states that when the flows at the Arkansas-Louisiana border fall below the 3,000 cfs target, the "states" of Oklahoma, Texas and Arkansas – i.e., the same entities allocated the "equal rights to the use of water" – must then "*allow to flow* into the Red River for delivery to the State of Louisiana" (emphasis added) water necessary to meet the flow

targets of the downstream state, Louisiana. Each state determines how to meet this requirement based on its own water policies. Those states, of course, can only "allow to flow" water within their boundaries and over which they have regulatory control. When the flows at the Arkansas-Louisiana boundary are below 1,000 cfs those states must allow all runoff and undesignated flows "within their respective states" to flow into the Red River. If Texas were allowed to take Oklahoma and Arkansas water from the parts of the subbasin within those states, then some mechanism to relieve the exporting state from its obligations would have been included. No such mechanism is present.

If there were any doubt that the allocation of equal rights to the use of water to the various states only extended to that water found within their respective state boundaries, it is removed by the Interpretative Comments. As the Interpretative Comments relating to Reach II note, "[t]his reach, involving all four states, was the most difficult portion of the Compact to negotiate." C.A. Pl. App. 432. The upstream states (Oklahoma, Texas and Arkansas) agreed that Louisiana needed water from the mainstem, but "the problem was to make provision for this flow without release from upstream storage" because "[u]nder no circumstance would upstream states agree to release water stored in upstream reservoirs for the benefit of downstream states[;] therefore there could be no guaranteed flows to downstream states." C.A. Pl. App. 432. Using the last downstream major dam on the

tributaries as a boundary, the Compact divided this Reach into five subbasins: four "upstream" subbasins (Subbasins 1-4), and one "mainstem" subbasin (Subbasin 5). "Within the upstream subbasins, flows were divided between the concerned states; below the last downstream dams, i.e., in subbasin 5, the *upstream states agree to cooperate* in assuring a reliable flow to Louisiana." C.A. Pl. App. 433 (emphasis added). As the Comments thus note, the allocation accomplished by the Compact for Subbasin 5 is different:

> In subbasin 5, as previously noted, the upstream *states* cooperate in assuring reliable flows to Arkansas and Louisiana. This is accomplished by keying *the upstream states' obligation* to the flow at the Arkansas-Louisiana boundary. When the flow is high, above 3,000 cfs, all *states* are free to use whatever amount of water they can put to beneficial use. If the *states* have competing uses and the amount of water available in excess of 3,000 cfs cannot satisfy all such uses, each *state* will honor the other's *right* to 25% of the excess flow.

C.A. Pl. App. 434-35 (emphasis added).

Not only were the flows of the upstream basins "divided" among the States, "upstream states are not required to make releases from storage or to pass water from other subbasins in order to maintain the flow at the Arkansas-Louisiana boundary – although, an upstream state could do either *in order to allow its diverters* in subbasin 5 to use equivalent quantities

during low flow periods." C.A. Pl. App. 435 (emphasis added). Significantly, then, the Compact distinguishes between the role of the "state" – the entity to which the water is allocated and upon whom the obligation to deliver water is imposed – and "its diverters," i.e., the persons or entities within the state that can partake of that state's allocated share of the interstate waters. In all cases, however, the Compact assumes that the state to whom the water is allocated will partake of that allocation through the beneficial (or riparian, in the case of Arkansas and Louisiana) use of "its diverters."

The Compact, like virtually all comparable compacts, allocates water to each state for that state's internal use. Indeed, one of the "principal purposes" of the Compact is to "provide a basis for state or joint state planning and action by ascertaining and identifying *each state's share* in the interstate water of the Red River Basin and the apportionment thereof." Art. I, § 1.01(e) (emphasis added). Most importantly, in order to allow for that planning and protect against the demands of a faster-growing neighboring state, the Compact contains an anti-forfeiture provision: "The failure of any state to use any portion of the water allocated to it shall not constitute relinquishment or forfeiture of the right to such use." Art. II, § 2.04.

Tying these purposes of the Compact with the express use of the word "allocate[]" to describe the effect of the provisions governing Reach II, Subbasin 5, it is clear that Tarrant's interpretation is at odds

with the text and purpose of the Compact. How could the Compact determine "each state's share" and protect that share from claims of other states through the anti-forfeiture provision if it is read to allow Texas to take a portion of its share in Oklahoma from a river that never flows into Texas? Texas did not bargain for a provision that would allow it to take Oklahoma water simply because its population has grown faster than Oklahoma's and because its needs now exceeds the allocation it negotiated for in the Compact. When Texas agreed to the anti-forfeiture provision, it gave up to Oklahoma the right to decide whether to take water in the stream, send it down to meet the needs of Louisiana, support in-stream flows within Oklahoma, or sell it to Texas. But in no case did the drafters intend that Texas could use its growth as a sword to go into Oklahoma and without Oklahoma's consent take Oklahoma's water before it arrives at the border. Texas asks this Court to rewrite the Compact because, in its view, this would be a good policy result. This Court cannot rewrite the Compact to supply provisions that do not exist, whatever the alleged equities in favor of the Dallas/Fort Worth metroplex. *Texas v. New Mexico*, 462 U.S. at 564.

Moreover, Tarrant's argument only makes any sense by focusing exclusively on the supply in Subbasin 5 and ignoring the water Texas received in the remainder of Reach II. In fact, Texas struck a very good bargain relating to the flows originating in Texas in Reach II as a whole. Again, the Interpretative Comments note that the solution to meeting both the

demands of the upstream states (Oklahoma, Texas and to some extent Arkansas) and the flow needs of the downstream state, Louisiana, was to divide the entire Reach into subbasins using the criteria of the last downstream major reservoir. As a result, Texas received free and unrestricted use of all waters in Reach II, Subbasins 2 and 4 and is able to retain all water that flows into the damsites that separate these subbasins from Subbasin 5. That water cannot be taken by another Compacting State, and Texas cannot be forced to release water from those reservoirs even when the flows at the Arkansas-Louisiana border fall below the prescribed amounts. Texas bargained for and received virtually all of the significant water originating in Texas. It is disingenuous at best for Tarrant to now assert the right to take the water from other states in Subbasin 5 in addition to all of the water originating in Texas.

The hydrologic facts are not complicated. Tarrant has no authority to require Oklahoma to release water from Hugo reservoir and allow it to flow outside Oklahoma borders so that it is available to Texas. Texas also cannot prevent Oklahoma from using water before it reaches the Oklahoma border or determine what is the best use of that water when it is within Oklahoma's borders. More importantly, while that water is within Oklahoma, it forms the basis for Oklahoma's water planning efforts. The Dallas/Fort Worth megalopolis of six million people is not part of the Oklahoma water planning region and never will be. Yet, Tarrant argues that the intent of

the compacting parties was to make Tarrant part of Oklahoma's water planning region. This is inconceivable. Understandably, Tarrant is in a bind because Texas did not negotiate a downstream delivery requirement that would make Oklahoma's water available to Tarrant outside Oklahoma's borders. Dissatisfied with Texas' efforts in the negotiations, Tarrant wants to "jump the line" and take the water before it leaves Oklahoma. Nothing in the text or history of the Compact supports this result.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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REPLY BRIEF

No. 11-889

In the Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,

Petitioner,

v.

RUDOLF JOHN HERRMANN *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Because respondents fundamentally misstate the arguments advanced in the petition, we begin by reiterating the issues in this case. *First*, as the court of appeals itself acknowledged, Oklahoma's statutes expressly discriminate against out-of-state users of water: "these statutes require the OWRB to treat permits for in-state and out-of-state water use differently." Pet. App. 5a. Respondents' confusing and carefully worded description of Oklahoma law (Opp. 7-9) does not deny that Oklahoma's regime—which bars out-of-state use of water originating in Oklahoma absent both a showing that the water cannot be used in Oklahoma and (for water apportioned to Oklahoma by the Compact) prior approval by the Oklahoma legislature—has the practical effect of making it impossible for out-of-state applicants like Tarrant to obtain water from Oklahoma. See Pet. 7-9.[1]

Second, as we show in the petition, the Oklahoma scheme is invalid for two reasons. It is inconsis-

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[1] As we showed in the petition (at 8), the statutory requirements that the OWRB permit long-term water appropriations only when doing so "will promote the optimal beneficial use of water in" Oklahoma, and that it consider whether water sought for out-of-state use "could feasibly be transported to alleviate water shortages in the State of Oklahoma," effectively preclude the export of water from Oklahoma. Respondents complain (Opp. 7-8) that many of the other provisions we cited in the petition are immaterial here. But our point is that Tarrant has no choice except to obtain a permit under Oklahoma's restrictive permitting scheme. Thus, as the court of appeals recognized, "[i]f Tarrant is correct that the Compact gave it a right to appropriate water in Reach II, Subbasin 5, the Oklahoma statutes would burden that right because they treat in-state and out-of-state water use differently." Pet. App. 30a.

tent with the Commerce Clause because it requires the OWRB to use criteria that discriminate against out-of-state interests when acting on applications to appropriate water in Oklahoma, even though the Red River Compact does not authorize that discrimination with the clarity necessary to overcome Commerce Clause strictures (indeed, it does not authorize the discrimination *at all*). See Pet. 14-24. And the Oklahoma regime is preempted by the plain terms of the Compact, which expressly allocate to Texas the water that is in dispute in this case. See Pet. 27-34.

Third, the issues in this case have immense practical importance. We explained in the petition that the holding below denies an essential resource to millions of people in Texas, which will cause significant disruption and greatly impede economic growth. Pet. 24-27. The State of Texas confirms in its *amicus* brief supporting the petition that the Tenth Circuit's holding "put[s] at risk for insufficient water one of the most populous and productive areas of the country," with "potentially devastating and long-lasting consequences." Texas Br. 6. Respondents make no answer at all to this point.

Against this background, the arguments that respondents do advance are insubstantial. Oklahoma law expressly discriminates against other States; disregards the clear language of the Compact; has been vigorously protested by Texas; and "destroys Tarrant's ability to acquire necessary water from one of the most economically sensible and environmentally appropriate resources available." Texas Br. 6. Further review of the decision below is imperative.

A. Respondents misunderstand the dormant Commerce Clause argument.

1. At the outset, respondents flatly misstate our Commerce Clause argument. We do not contend, as respondents repeatedly would have it, that the Compact *itself* violates the Commerce Clause. See Opp. 10, 12, 23-26. Our actual contention, instead, is that *Oklahoma's statutes* violate the Clause because they discriminate against out-of-state interests and have not been authorized by Congress with the clarity required by this Court's decisions. See Pet. 15-24.

Unlike respondents, the Tenth Circuit understood and addressed our argument, holding that the Compact "insulates Oklahoma's statutes from dormant Commerce Clause challenge" (Pet. App. 23a)—and that ambiguity on this score in the Compact's language may be resolved by reference to its legislative history. Pet. App. 25a-26a. But as we showed in the petition, that holding departs from the rule repeatedly stated by this Court and applied by other courts of appeals: congressional authorization of state laws that burden interstate commerce must be "unambiguous" (*Wyoming* v. *Oklahoma*, 502 U.S. 437, 458 (1992)) and "unmistakably clear" (*S.-Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 91 (1984)). As we also demonstrated at some length in the petition (at 19-24), the language of the Compact is neither. Respondents have nothing to say in response.

2. Respondents also ignore a related point made in the petition: that the holding below is likely to have repercussions throughout the Nation because the boilerplate language relied upon by the Tenth Circuit to authorize Oklahoma's discrimination appears in numerous compacts governing the allocation

of water among States. See Pet. 25 & n.12; see also *Amicus* Br. of Cities of Hugo and Irving 13-14 & nn. 14, 15.[2] Respondents instead assert that the Tenth Circuit held only that "compacts apportion and allocate water among states in perpetuity," which they describe as a "[]settled" proposition incapable of "disrupt[ing] the national body politic." Opp. 13-16. But while the proposition stated by respondents may well be settled, it is *not* the issue resolved by the Tenth Circuit in this case. The question presented *here* and decided below is whether the Red River Compact contains a clear statement of Congress's consent to Oklahoma's protectionist water regime. See, *e.g.*, Pet. App. 3a (first issue addressed by the Tenth Circuit is: "did Congress authorize the Compact states to protect their apportionments of water through measures that otherwise might violate the dormant Commerce Clause?"). On *that* subject, respondents have nothing to say.[3]

B. Respondents' argument assumes away the preemption issue.

1. Respondents fare no better in their defense of the Tenth Circuit's preemption ruling. The Compact

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[2] Respondents assert (incorrectly, as we show below) that the Compact language granting the signatory States "equal rights" to the water in reach II, subbasin 5 is "unique" (Opp. 10, 17), but they do not deny that the different and generic language relied upon by the Tenth Circuit to authorize Oklahoma's discrimination appears in numerous compacts across the country.

[3] Indeed, respondents themselves demonstrate the perils entailed by resort to legislative history. Citing the Compact's interpretive comments, they assert (Opp. 33-34) that "the Compact distinguishes between the role of the 'state' * * * and 'its diverters.'" But that simply is not so: neither the word "diverter," nor any similar distinction, appears in the Compact itself.

establishes reach II, subbasin 5 as an interstate region that spans the borders of Texas, Oklahoma, and Arkansas. See Pet. App. 52a (map). The Compact provides that "[w]ater within this subbasin is allocated as follows: (1) the Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5," with no State "entitled to more than 25 percent of the water in excess" of certain minimum downstream flow requirements. Compact § 5.05(b); see also Opp. 33 (citing the interpretive comments for the proposition that each State has a "right to 25% of the excess flow" in subbasin 5). The meaning of these words is wholly unambiguous: Each State is entitled to an *equal* share, up to 25%, of the excess water in subbasin 5.

Oklahoma's discriminatory rules undeniably "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives" (*AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1753 (2011)) of that provision. It must be assumed that Texas cannot obtain an equal share of reach 2, subbasin 5 water from sources in Texas. See Pet. App. 44a n.3. By preventing Texas from accessing subbasin 5 water in Oklahoma, the state laws challenged here thus prevent Texas from obtaining the equal share of subbasin 5 water allocated to it by the Compact.[4] As we showed in the petition (at 27-34), the Tenth Circuit's contrary reading disregarded the Compact's plain terms and manifest intent.

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[4] The court of appeals recognized that "some [Oklahoma] statutes are in tension with Tarrant's reading of the Compact." Pet. App. 44a n.2.

2. Respondents' answers on this point are obscure. *First*, respondents assert that "there can be no other meaning when the Compact 'allocate[s]' the use of water to a particular 'state' than that it is for that state's exclusive in-state use." Opp. 30-31. But the Compact, by its plain terms, does *not* allocate all reach 2, subbasin 5 water located *in* Oklahoma *to* Oklahoma; it allocates that water "as follows," and what follows is that "the Signatory States shall have *equal rights* to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5." Compact § 5.05(b)(1) (emphasis added). Nothing in this language even remotely says that subbasin 5 water is allocated exclusively to the State in which it is found.[5]

Second, and similarly, respondents assert that "[t]he phrase 'equal rights' simply means that within this subbasin, each state can authorize the use of water within the state, but, ultimately, its use cannot exceed an amount equal to what is used by other states." Opp. 31. But the plain fact of the matter is that the Compact says nothing of the sort. The statement that each of the signatory States shall have "equal rights to the use of" a particular quantity of water located in a particular place (defined without reference to state borders) cannot plausibly

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[5] Respondents' reliance on the Compact's interpretive comments in support of their reading is mystifying. As the portion of the comments quoted by respondents itself demonstrates, these materials simply show that the signatory States agreed to assure a minimum flow to Arkansas and Louisiana and that "'each *state* will honor the other's *right* to 25% of the excess flow'"—an observation that supports *our* reading of the Compact. Opp. 33 (quoting C.A. Pl. App. 434-435 (emphasis added by respondents)).

be understood as another way of saying that each State controls the use of all waters within *its* borders. Were there any doubt on this point—and it is hard to see how there could be, given the clarity of the Compact's language—it would be resolved by the contrast with other provisions of the Compact that, unlike Compact § 5.05(b)(1), *do* impose state-boundary limitations on the allocation of water. See Pet. 32 (citing Compact §§ 5.03(b), 6.03(b)).[6]

And respondents ignore the common sense of the matter. The Compact's guarantee to Texas of an "equal" share of subbasin 5 water would amount to precious little if Texas were limited, as respondents claim, to the subbasin 5 water located in Texas; within its borders, Texas has access to only "a small fraction" of the subbasin 5 water to which it is entitled. Pet. App. 41a. It would be a strange bargain indeed for Texas to negotiate for an "equal right[] to the use" of water that it knew it could never obtain.[7]

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[6] Respondents note that other compacts make express provision for water to be diverted from one state to another and suggest that the omission of such language from the Red River Compact means that Texas can have no entitlement to water located in Oklahoma. Opp. 18-20. But "[a] compact is a contract," not a statute. *Kansas* v. *Colorado*, 533 U.S. 1, 20 (2001) (O'Connor, J., concurring in part and dissenting in part). And it is reasonable to expect compacting states to use (and experiment with) different language, even to accomplish the same ends. It is *not* reasonable, however, to expect the drafters of a compact to use inconsistent language in different sections of the *same compact* to convey a single meaning.

[7] Respondents' suggestion that the words "equal rights" mean that "each state can authorize the use of [subbasin 5] water within the state" but "cannot exceed an amount equal to what is used by other states" (Opp. 31) is, for the same reason, ridiculous. By its terms, the argument would mean that the signatory

C. Respondents provide no other reason for denying review.

None of respondents' other arguments provides any basis for denying the petition.

1. Respondents contend that this case is unsuitable for review because none of the "four signatories to the Compact" is a "part[y] to the litigation" (Opp. 11), and that the Court should await a suit that "the Compacting States [themselves] consider" sufficiently important to "require[] resolution by this Court." Opp. 16. But as Texas makes clear in its *amicus* brief before this Court, Tarrant is "an entity created under Texas law * * * to acquire water" for Texas residents; it is one of several local water districts authorized to invoke and enforce "Texas's water rights under the Red River Compact." Texas Br. 1-2. That is why this suit was brought by Tarrant (which actually manages water in Texas) and not by Texas's governor or attorney general (who do not), against the OWRB, which issues permits for the appropriation of water in Oklahoma and is here represented by Oklahoma's attorney general. As for respondents' assertion that the Compacting States "would like to weigh in on Tarrant's arguments" (Opp. 11), Texas has done precisely that, asserting its "substantial interest in the Court granting the petition and reversing the Tenth Circuit's judgment." Texas Br. 1.[8]

States agreed to use no more subbasin 5 water than the small amount available to Texas from sources within its borders. Indeed, it evidently would mean that the States agreed not to use *any* subbasin 5 water at all because there is no subbasin 5 water located in Louisiana.

[8] Respondents misrepresent the evidence in asserting (Opp. 6) that "Texas has not complained of any shortage of water allocated to it by the Compact." In fact, the deposition testimony

2. Respondents also are wrong in contending, without citation, that Tarrant has changed its position on key points in the litigation. Their suggestion (Opp. 28) that Tarrant "vehemently argued [below] that the Compact apportioned no water to any Compacting State" is silly; Tarrant's sole purpose in bringing this litigation was to establish that the Compact apportions subbasin 5 water "equally" between the signatory States, a point that is evident from the decisions of both the court of appeals and the district court. And that Tarrant resisted joinder of Arkansas and Louisiana as indispensable parties to this suit (because they did not face a risk of multiple inconsistent judgments) hardly means that it denied that this dispute is "a case of great significance." Opp. 11.[9]

3. Finally, respondents suggest at various points that the preemption question presented in the petition is a "narrow" one "of no national significance" (Opp. 12) because the language that we say preempts Oklahoma's protectionist laws occurs "in no other compact" (Opp. 10, 17). In fact, that assertion is factually incorrect: Most interstate water compacts *do* contain similar equitable apportionment provisions. See *Amicus* Br. of Cities of Hugo and Irving 18; see also *Montana* v. *Wyoming*, 131 S. Ct. 1765, 1770,

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cited by respondents shows only that certain Texas permittees had received all of the water to which they were entitled under separate *Texas permits* that have no bearing on this case.

[9] Respondents likewise are wrong in asserting that this litigation could have been resolved by the Red River Compact Commission. Opp. 11-12. In fact, the district court declined to defer to the Commission because "it is unclear whether the Commission's authority even arguably extends to adjudicating disputes like those involved here." Pet. App. 60a.

1779 (2011) (citing compacts that apportion a "set quantity" of available water "by percentage"). The Tenth Circuit's preemption analysis therefore does have broad implications for the interpretation of interstate water compacts throughout the Nation. But even if that were not so, respondents' brief itself demonstrates that this Court's special responsibility to settle the meaning of agreements between States has led it to grant review repeatedly in similar cases, "so as to clarify the quantity of water apportioned to each Compacting State." Opp. 13 (citing cases). It should do so here as well.

Moreover, respondents do not deny that the need for intervention by the Court is especially acute in this case because the dispute here involves issues of the greatest practical importance. The Tenth Circuit's decision allows Oklahoma to deny Tarrant the water that is desperately needed by millions of consumers. The significance of that ruling cannot be overstated: The Tenth Circuit's decision risks "halting further economic growth and development" throughout North Texas. *Amicus* Br. of NTMWD 5. The need for intervention by this Court is clear.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2012

AMICUS CURIAE BRIEF

No. 11-889

In the Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT, PETITIONER

v.

RUDOLF JOHN HERRMANN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Red River Compact (the Compact) apportions the water in the Red River Basin between the States of Arkansas, Louisiana, Oklahoma, and Texas. Act of Dec. 22, 1980, Pub. L. No. 96-564, 94 Stat. 3305. To accomplish that apportionment, the Compact divides the Red River Basin into five reaches, and it further divides each reach into subbasins. Compact § 2.12, 94 Stat. 3307; Art. IV-VIII, 94 Stat. 3308-3315. For the water in Reach II, Subbasin 5, the Compact provides:

> The Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second.

§ 5.05(b)(1), 94 Stat. 3311. The questions presented are as follows:

1. Whether Section 5.05(b)(1) of the Compact allows petitioner to divert water included in Texas's apportionment of Reach II, Subbasin 5 from within Oklahoma, thereby superseding Oklahoma statutes that would prohibit Texas water users from accessing that water.

2. Whether the dormant Commerce Clause prohibits respondents from enforcing Oklahoma statutes that would prevent petitioner from accessing Texas's apportionment of Reach II, Subbasin 5 water from within Oklahoma.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. The Red River flows from west to east across the north Texas panhandle, forms the boundary between Oklahoma and Texas[1] and then between Arkansas and Texas, then flows through Arkansas and finally into Louisiana where it joins the Atchafalaya and Mississippi Rivers. See Pet. App. 52a. In 1955, Congress granted permission to Arkansas, Louisiana, Oklahoma, and Texas to negotiate an agreement apportioning the water in

[1] The border between Texas and Oklahoma is at the river's south bank. See *United States* v. *Texas*, 162 U.S. 90-91 (1896).

the Red River Basin among those States. Act of Aug. 11, 1955, ch. 784, 69 Stat. 654. In 1978, the States entered into the Red River Compact (the Compact), which Congress approved in 1980. Act of Dec. 22, 1980, Pub. L. No. 96-564, 94 Stat. 3305. One purpose of the Compact is to "provide an equitable apportionment among the Signatory States of the water of the Red River and its tributaries." § 1.01(b), 94 Stat. 3305. To accomplish that apportionment, the Compact divides the Red River Basin into five reaches, and it further divides each reach into subbasins. § 2.12, 94 Stat. 3307; Art. IV-VIII, 94 Stat. 3308-3315. The water in each subbasin is allocated to one or more of the compacting States. Art. IV-VIII, 94 Stat. 3308-3315.

Section 2.01 of the Compact provides that "[e]ach Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state." § 2.01, 94 Stat. 3306. That section further provides that "[e]ach state may freely administer water rights and uses in accordance with the laws of that state, but such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact." *Ibid.* Section 2.10(a) of the Compact provides that "[n]othing in this Compact shall be deemed to * * * [i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, not inconsistent with its obligations under this Compact." § 2.10(a), 94 Stat. 3306-3307.

2. a. Petitioner is a Texas state agency that provides water to north central Texas, including Fort Worth, Arlington, and Mansfield. Pet. App. 4a. In 2007, in an effort to procure water for the growing needs of its service area, petitioner applied to the Oklahoma Water Re-

sources Board (OWRB) for permits to appropriate water at three locations in Oklahoma.[2] At issue in this case is petitioner's application for a permit to appropriate 310,000 acre feet per year of surface water from the Kiamichi River, an Oklahoma tributary of the Red River that is partially located within Reach II, Subbasin 5. Pet. 10.[3]

The Compact defines Reach II, Subbasin 5 as "th[e] portion of the Red River, together with its tributaries, from Denison Dam down to the Arkansas-Louisiana state boundary, excluding all tributaries included in the other four subbasins of Reach II." § 5.05(a), 94 Stat. 3311. That geographic area includes portions of Arkansas, Oklahoma, and Texas. Pet. App. 36a, 52a.

The water in Reach II, Subbasin 5 is apportioned as follows:

> The Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second.

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[2] Oklahoma law provides that anyone "intending to acquire the right to the beneficial use of any water" located in Oklahoma, including any "state or federal governmental agency, or subdivision thereof," must apply to OWRB for a permit. Okla. Stat. Ann. tit. 82, § 105.9 (West 1990).

[3] The main stem of the Red River is highly saline and thus is not useful as a potable water source. Petitioner therefore sought permission to divert water from the Kiamichi River, a freshwater tributary, just above where it discharges into the main stem of the Red River. No. 5:07-cv-00045-HE, Docket entry No. 6, at 3, 6 (Jan. 11, 2007)).

§ 5.05(b)(1), 94 Stat. 3311. When the Red River's flow is below 3,000 cubic feet per second at the Arkansas-Louisiana boundary, Arkansas, Oklahoma, and Texas must "allow to flow into the Red River for delivery to * * * Louisiana a quantity of water equal to 40 percent of the total weekly runoff originating in subbasin 5 and 40 percent of undesignated water flowing into subbasin 5." § 5.05(b)(2), 94 Stat. 3311. When the flow at the Arkansas-Louisiana boundary falls below 1,000 cubic feet per second, Arkansas, Oklahoma, and Texas must "allow a quantity of water equal to all the weekly runoff originating in subbasin 5 and all undesignated water flowing in subbasin 5 within their respective states to flow into the Red River." § 5.05(b)(3), 94 Stat. 3311-3312. When the flow at Index, Arkansas is below 526 cubic feet per second, Oklahoma and Texas must "allow a quantity of water equal to 40 percent of the total weekly runoff originating in subbasin 5 within their respective states to flow into the Red River." § 5.05(c), 94 Stat. 3312.[4]

b. On the same day that petitioner filed its permit application, petitioner sued the members of the OWRB, respondents here, in federal district court in Oklahoma.[5]

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[4] Petitioner's other two permit applications sought permission to appropriate water from Beaver Creek and Cache Creek, which are Oklahoma tributaries of the Red River in Reach I, Subbasin 2. Pet. 10. Under the Compact, Oklahoma has "free and unrestricted use" of the water in that subbasin. § 4.02(b), 94 Stat. 3309. Petitioner does not seek review of the court of appeals' affirmance of summary judgment for respondent on those claims. Pet. App. 26a.

[5] Section 13.03 of the Compact provides that "[t]he United States District Courts shall have original jurisdiction (concurrent with that of the Supreme Court of the United States, and concurrent with that of any other Federal or state court, in matters in which the Supreme Court, or other court has original jurisdiction) of any case or controversy involving the application or construction of this Compact."

Petitioner sought declaratory and injunctive relief barring respondents from applying certain Oklahoma statutes that govern the appropriation and use of water to bar petitioner from diverting water in Oklahoma. Pet. App. 2a. Specifically, petitioner challenged now-expired statutes that were enacted in 2004 and placed a five-year moratorium on the export of water from Oklahoma. See Okla. Stat. Ann. tit. 82, § 1B(A), tit. 74, § 1221.A (West Supp. 2012); Pet. App. 7a. Petitioner also challenged a statute that prohibits the OWRB from making any contract "conveying the title or use of any waters of" Oklahoma for sale or use in another State "unless such contract be specifically authorized by an act of the Oklahoma legislature," *id.* 82, § 1085.2(2) (West 1990); and another that provides an exception to the general requirement that permitted water be put to beneficial use within seven years only if the proposed use "will promote the optimal beneficial use of water in [Oklahoma]," *id.* § 105.16(B) (West Supp. 1993). Petitioner alleged that the Oklahoma statutes place impermissible burdens on interstate commerce in violation of the Commerce Clause and are preempted by the Compact's grant of "equal rights" to the use of Reach II, Subbasin 5 water to all four compacting States. Pet. App. 6a. By stipulation of the parties, respondents will take no action on petitioner's permit applications until this litigation concludes. Pet. 10.

Respondents moved to dismiss the complaint on grounds of ripeness, Eleventh Amendment immunity, abstention principles, and failure to join Louisiana and Arkansas as parties. Pet. App. 8a. The district court denied the motion, *Tarrant Reg'l Water Dist.* v. *Herr-*

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§ 13.03, 94 Stat. 3319. That jurisdiction "shall include, but not be limited to, suits between Signatory States." *Ibid.*

mann, No. CIV-07-0045-HE, 2007 WL 3226812 (W.D. Okla. Oct. 29, 2007), and the court of appeals affirmed. *Tarrant Reg'l Water Dist.* v. *Sevenoaks*, 545 F.3d 906 (10th Cir. 2008).

c. Petitioner then amended its complaint to challenge additional Oklahoma laws that were enacted after the complaint was filed. Petitioner challenged a new requirement that the OWRB must consider whether water that is the subject of a permit application "could feasibly be transported to alleviate water shortages in the State of Oklahoma" (Okla. Stat. Ann. tit. 82, § 105.12(A)(5) (West Supp. 2012)); a requirement that the OWRB may not issue permits to out-of-state water users if that use would "[i]mpair the ability of the State of Oklahoma to meet its obligations under any interstate stream compact" (*id.* § 105.12A(B)); a periodic permit-review scheme applicable only to out-of-state water users (*id.* § 105.12(F)); and a legislative-approval requirement for out-of-state water users before the OWRB may grant a permit for "water apportioned to [Oklahoma] under an interstate compact" (*id.* § 105.12A(D)). Pet. App. 9a-10a.

3. The district court granted summary judgment for respondents. Pet. App. 53a-74a.

a. The court rejected petitioner's argument that the Oklahoma statutes, by placing restrictions on out-of-state applicants for Oklahoma water permits, violate the Commerce Clause. Pet. App. 61a-69a. The court concluded that although the dormant Commerce Clause is "ordinarily directed to preventing protectionist state measures designed to secure an economic or other advantage for the state or its citizens," "approval of the [Compact] by Congress * * * constituted its consent to a legal scheme different from that which would oth-

erwise survive Commerce Clause scrutiny." *Id.* at 67a, 68a.

b. The court further rejected petitioner's argument that the Oklahoma statutes are preempted by Section 5.05(b)(1) of the Compact. Pet. App. 70a. The court stated that "[i]n light of the foregoing discussion as to Congress' intent in the context of a Commerce Clause claim, the court can discern no basis upon which the [Compact] could be a basis for preemption." *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-52a.

a. The court rejected petitioner's dormant Commerce Clause argument. Pet. App. 15a-28a. The court acknowledged this Court's holding in *Sporhase* v. *Nebraska*, 458 U.S. 941 (1982), that a Nebraska law restricting the interstate transfer of groundwater violated the Commerce Clause. Pet. App. 24a. The court stated that a protectionist state law restricting commerce in water would withstand Commerce Clause scrutiny only if Congress's consent to the state law is "expressly stated" or otherwise "unmistakably clear." *Id.* at 19a-20a (citing *Sporhase*, *supra*, and *South-Central Timber Dev.* v. *Wunnicke*, 467 U.S. 82 (1984)). The court concluded that the Compact contained such a clear statement. *Id.* at 24a.

The court explained that by ratifying Section 2.01's statement that "Oklahoma may 'freely administer' appropriated water and use it 'in any manner' the state deems beneficial, Congress conferred broad regulatory authority on the state using unqualified terms." Pet. App. 24a-25a; see also *id.* at 25a-26a (citing Compact § 2.10(a), 94 Stat. 3306-3307). The court concluded that, "[t]aken together, the Compact provisions * * * give the Oklahoma Legislature wide latitude to regulate in-

terstate commerce in its state's apportioned water." *Id.* at 27a.

b. The court of appeals also rejected petitioner's argument that Section 5.05(b)(1) of the Compact preempts Oklahoma statutes that restrict Texas water users from diverting Reach II, Subbasin 5 water in Oklahoma. Pet. App. 28a-45a. The court stated that it was "especially reluctant to find preemption in matters of longstanding state regulation," and that "[t]he presumption against preemption is particularly strong in this case because history reveals 'the consistent thread of purposeful and continued deference to state water law by Congress.'" *Id.* at 34a-35a (quoting *California* v. *United States*, 438 U.S. 645, 653 (1978)).

The court explained that the Compact's general provisions "demonstrate pronounced federal deference to state water law." See Pet. App. 35a (citing Compact §§ 2.01 and 2.10(a), 94 Stat. 3306-3307). Against that background, the court concluded that Section 5.05(b)(1) of the Compact, when "read in context" with the provisions in Section 5.05(b)(2)-(3) and (c) protecting Louisiana and Arkansas during periods of low flow (see p. 4, *supra*), did not contemplate that Texas (or petitioner) could divert in Oklahoma any of the Subbasin 5 water allocated to Texas. In particular, the court noted that Section 5.05(b)(3) and (c) of the Compact require upstream states to allow certain quantities of water "within their respective states" to flow into the Red River to maintain downstream flow requirements. *Id.* at 37a, 39a. The court concluded that, "[t]aken together, the provisions of [Section] 5.05 stand for the principle that the upstream states control the water within their boundaries, provided they meet their minimum flow ob-

ligations to downstream states and do not take more than an equal share of the excess water." *Id.* at 39a.

The court reasoned that Section 5.05(b)(1) itself "does not say that a Texas user is entitled to take Texas's share of th[e] water from a tributary located in Oklahoma[,] [a]nd it does not say that the OWRB is precluded from applying Oklahoma water laws to a[n] application to divert water in Oklahoma for use in Texas." Pet. App. 40a. The court explained that although those inferences might be plausible "based on the language of [Section] 5.05(b)(1) alone," the inferences are not reasonable when Section 5.05(b)(1) is read in conjunction with the Compact as a whole, especially in light of the presumption against preemption. *Ibid.*

The court found support for its reading of Section 5.05(b)(1) in the interpretive comments provided by the compact drafters' Legal Advisory Committee. Pet. C.A. App. 417-450.[6] The interpretive comments state that, in Reach II, Subbasin 5, "the upstream states cooperate in assuring reliable flows to Arkansas and Louisiana," and that "[t]his is accomplished by keying the upstream states' obligation to the flow at the Arkansas-Louisiana boundary." *Id.* at 434-435. In the court's view, "[t]he Interpretive Comments do not identify another purpose for [Section] 5.05 and do not suggest any intent to preempt state law." Pet. App. 39a.

The court therefore concluded that the language in Section 5.05(b)(1) affording each State "equal rights to the use of" the excess water in Reach II, Subbasin 5

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[6] The Legal Advisory Committee wrote interpretive comments "so that members of the respective legislatures, congressional committees, Federal agencies, and subsequent compact administrators might be apprised of the intent of the Compact Negotiating Committee with regard to each Article of the Compact." Pet. C.A. App. 419.

"can reasonably be read to mean that each signatory state has the same opportunity and entitlement to use up to 25 percent of the excess water *in its state* and under its state laws," but not to divert any water outside its own borders. Pet. App. 42a-43a (emphasis added).

DISCUSSION

The question whether respondents may enforce state laws that effectively prohibit petitioner from diverting any water in Reach II, Subbasin 5 of the Red River Basin in Oklahoma for use in Texas turns on an interpretation of the Compact and its preemptive effect. No presumption against preemption should apply in interpreting a compact among States that apportions a common resource. Although the record concerning the factual context for the Compact may not be fully developed in some respects, as the case comes to this Court, the better reading of the Compact is that a State may divert a portion of its share of Reach II, Subbasin 5 water from outside of its boundaries, at least when necessary to exercise its "equal right[]" to excess water in that subbasin. Because of the important interests at stake and the practical impact that the court of appeals' decision apparently would have on water planning in a major urban area in Texas, the Court should grant certiorari to resolve that specific issue. There are, however, additional issues that would have to be resolved, in this case or in other proceedings, to determine whether petitioner may divert a portion of Texas's share of Reach II, Subbasin 5 water from within Oklahoma, and, if so, the nature and scope of the protection afforded by the Compact.

A. The Court of Appeals Erred In Holding That Section 5.05(b)(1) Of The Compact Would Never Entitle Petitioner To Access Reach II, Subbasin 5 Water In Oklahoma

1. As an initial matter, the court of appeals improperly applied a presumption against preemption to determine whether the challenged Oklahoma statutes conflict with, and therefore are displaced by, Section 5.05(b)(1) of the Compact. See Pet. App. 29a, 34a, 40a, 41a, 43a. This Court has applied a presumption against preemption when a controversy concerns whether a given state authority conflicts with the existence of federal governmental authority. See, *e.g.*, *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996); *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 518-519 (1992); *Hillsborough Cnty* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985). The Court has explained that a presumption applies in those circumstances "because respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt'" state law. *Wyeth* v. *Levine*, 555 U.S. 555, 565 n.3 (2009) (quoting *Lohr*, 518 U.S. at 485).

A presumption against preemption should not be applied to disputes over whether a state law conflicts with an interstate compact. An interstate compact approved by Congress is a federal law, see *Cuyler* v. *Adams*, 449 U.S. 433, 440 (1981), but it is not a federal law imposed by Congress on the States. The compact is instead a collaborative effort among States to formulate a solution to a common problem, which is later given the status of federal law when the agreement is presented by the compacting States and approved by Congress. Accordingly, the Court has recognized that a compact is "a contract * * * that must be construed and applied in ac-

cordance with its terms." *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987) (citation omitted). Such a compact ordinarily embodies a number of compromises and mutual cessions of rights and authority that the respective States might otherwise claim. A generalized presumption against preemption is out of place in determining whether the rights or regulatory authority of one signatory State on a particular issue have been given up or displaced by the compact.

2. Under the record developed in this case, and without the application of a presumption against preemption, the better reading of Section 5.05(b)(1) of the Compact is that a State, at least in certain circumstances, may access water from its allocated share of Reach II, Subbasin 5 outside of the State's boundaries.

Section 5.05(b)(1) of the Compact provides that when the flow of the Red River at the Arkansas-Louisiana border is 3,000 cubic feet per second or more, "[t]he Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, * * * provided no state is entitled to more than 25 percent of the [excess] water." § 5.05(b)(1), 94 Stat. 3311. Subbasin 5 encompasses parts of three States, see § 5.05(a), 94 Stat. 3311, and the provision makes no reference to state boundaries in its description of those States' "equal rights" to use water in the subbasin. § 5.05(b)(1), 94 Stat. 3311.

By contrast, in other Compact provisions that divide the water of a subbasin between States, the Compact does provide a geographic limitation on a State's ability to access its allocated share of water. For example, the Compact divides Reach II, Subbasin 3 between Oklahoma and Arkansas and provides that "[t]he States of Oklahoma and Arkansas shall have free and unrestricted

use of the water of this subbasin *within their respective states*," subject to certain downstream flow requirements. § 5.03(b), 94 Stat. 3310 (emphasis added). Similarly, the Compact divides Reach III, Subbasin 3 between Texas and Louisiana and provides that "Texas and Louisiana *within their respective boundaries* shall each have the unrestricted use of the water of this subbasin," subject to certain other requirements. § 6.03(b), 94 Stat. 3313 (emphasis added). Section 5.05(b)(1) contains no similar state-boundary restriction.

The Compact's limitation of each State's allocated share to "[no] more than 25 percent of the [excess] water" is also significant. § 5.05(b)(1), 94 Stat. 3311. If it were the case that one or more States could not access a 25 percent share of the excess water in Reach II, Subbasin 5 from within their boundaries, that would be relevant extrinsic evidence supporting an interpretation that a State may divert its share of water from outside of its boundaries. Petitioner argued to the courts below that Texas could not fully access its share of Reach II, Subbasin 5 water from within the State because "the part of Texas located in Reach II, Subbasin 5 contains primarily intermittent streams and dry arroyos yielding a small fraction of the total water flowing in Subbasin 5." Pet. App. 41a (internal quotation marks and citation omitted). The lower courts did not allow petitioner to present evidence on that point, see *id.* at 44a n.3, but Section 5.05(b)(1)'s guarantee of equal rights to the water in Reach II, Subbasin 5 would be thwarted if a State could not access its equal share from within its boundaries, yet was barred from diverting any of that share in another State.[7]

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[7] Although the main stem of the Red River passes through or borders each State, it does not follow that each State could divert its

3. a. The court of appeals concluded that the purpose of Section 5.05(b) is simply "to ensure that an equitable share of water from the subbasin reaches the states downstream from Oklahoma and Texas." Pet. App. 36a. The court also read the interpretive comments to indicate that Section 5.05(b) is designed to ensure adequate downstream flow and nothing more. *Id.* at 39a. That is incorrect.

Section 5.05(b) does more than ensure that downstream states receive adequate water during low-flow periods. Although Section 5.05(b)(2)-(3) and (c) establish downstream flow requirements, Section 5.05(b)(1) apportions the subbasin's excess water when the flow *exceeds* 3000 cubic feet per second. The interpretive comments identify that purpose by explaining that "[w]hen the flow is high, * * * all states are free to use whatever amount of water they can put to beneficial

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share of Reach II, Subbasin 5 water from within its boundaries. Along Texas's border with Oklahoma, the bed of the river is in Oklahoma. See n.1, *supra*. Under the court of appeals' interpretation of the Compact, petitioner could not divert water from the river's main stem. Furthermore, the water in the main stem is highly saline and thus not useful as a potable water source. That issue was known to the States when they entered into the Compact. The interpretive comments note that "[n]atural salt pollution in the Red River Basin is * * * seriously detrimental to all states." Pet. C.A. App. 447. Furthermore, the U.S. Army Corps of Engineers stated in a hearing on the Compact that "[t]he Red River main stem flows cannot be used for many purposes due to the chloride contamination from natural and manmade sources," but that "[g]enerally most tributary flows are suitable for domestic and industrial use with normal treatment." *Red River Compact and Caddo Lake Compact: Hearing on H.R. 7205 and H.R. 7206 Before the House Subcomm. on Admin. Law & Governmental Relations of the Comm. on the Judiciary*, 96th Cong. 2d Sess. 6 (1980) (statement of Colonel Alan L. Laubscher, Assistant Director of Civil Works, U.S. Army Corps of Engineers).

use," and that "[i]f the states have competing uses and the amount of water in excess of 3000 [cubic feet per second] cannot satisfy all such uses, each state will honor the other's right to 25% of the excess flow." Pet. C.A. App. 435. The court of appeals' conclusion that Section 5.05(b) is concerned only with downstream delivery requirements is further refuted by another portion of the comments "emphasiz[ing] that * * * periods of low flow on the mainstem are relatively rare," and that "[f]lows less than 3000 [cubic feet per second] have [historically] occurred only 4.2% of the time." *Ibid.*

b. The court of appeals also identified several "[g]eneral [p]rovisions" of the Compact that in its view "demonstrate pronounced federal deference to state water law," and concluded that "[t]he Compact's general policy is to give the Compact states unrestricted authority to regulate their apportioned water." Pet. App. 35a. The Compact's general provisions do not support a conclusion that Oklahoma may bar Texas water users from accessing any portion of *Texas's* share of Reach II, Subbasin 5 water in Oklahoma.

The general provisions of the Compact make clear that a State's regulation of water use within its boundaries must be consistent with the allocations made under the Compact. Section 2.01 provides that "[e]ach state may freely administer water rights and uses in accordance with the laws of that state, *but such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact.*" § 2.01, 94 Stat. 3306 (emphasis added). Similarly, Section 2.10(a) provides that "[n]othing in this Compact shall be deemed to * * * [i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water,

or quality of water, *not inconsistent with its obligations under this Compact.*" § 2.10(a), 94 Stat. 3306-3307 (emphasis added). The interpretive comments repeat that limitation. See Pet. C.A. App. 422 ("*Subject to the general constraints of water availability and the apportionment of the Compact*, each state is free to continue its existing internal water administration, or to modify it in any manner it deems appropriate.") (emphasis added).

Under those general provisions of the Compact, the States retain authority to enforce state water laws within their boundaries, but they may not enforce those laws if doing so would prevent another State from receiving and putting to beneficial use its allocated share of water. In those circumstances, the state laws would conflict with the Compact's terms and frustrate the accomplishment of its purposes. See *Hines* v. *Davidowitz*, 312 U.S. 52, 62-63 (1941).

B. The Court Of Appeals' Commerce Clause Holding Was Unnecessary

At this stage, the parties' dispute requires nothing more than an interpretation of the Compact and its preemptive force. Once the question of whether the Compact enables a State to access any portion of its share of Reach II, Subbasin 5 water from outside of its boundaries is resolved, the Commerce Clause has no role to play. Petitioner is asserting a right only to access water that, under its interpretation of the Compact, is allocated to Texas. Petitioner is not asserting a right to access water that is allocated to Oklahoma. See Pet. 20 n.9, 21. The court of appeals' dormant Commerce Clause holding was based on its conclusion that the water petitioner sought to access was water allocated to Oklahoma under the Compact. See Pet. App. 27a ("Tak-

en together, the Compact provisions * * * give the Oklahoma Legislature wide latitude to regulate interstate commerce *in its state's apportioned water*.").

If petitioner is correct that Texas water users may not be altogether barred from accessing Texas's allocated share of Reach II, Subbasin 5 water in Oklahoma, at least in some circumstances, then it is the Compact that prohibits respondents from enforcing state laws that would bar such access, not the Commerce Clause. See pp. 11-16, *supra*. Petitioner is not asserting a right to access water allocated to Oklahoma under the Compact.

C. The Issue Is Important

Although there is not a circuit conflict on the issues presented, this case implicates important state interests protected by an interstate compact, and the court of appeals' decision has potentially great practical consequences for the availability of water in a major urban area in Texas. Those concerns justify this Court's review.

1. This Court's original and exclusive jurisdiction over controversies between States, see U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. 1251(a), "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact," *Texas* v. *New Mexico*, 462 U.S. 554, 567 (1983). See, *e.g.*, *New Jersey* v. *New York*, 523 U.S. 767, 773-774 (1998); *Kansas* v. *Colorado*, 514 U.S. 673 (1995); *Virginia* v. *West Virginia*, 206 U.S. 290, 317-319 (1907). In claiming that respondents are depriving Texas water users of Texas's ability to use its lawful share of water of an interstate river, petitioner asserts a substantial sovereign interest of Texas that would fall squarely within what is ordinarily the exclusive jurisdiction of this Court had the suit been brought by Texas itself against Oklahoma. See, *e.g.*, *Texas* v.

New Mexico, 462 U.S. at 567; *Arizona* v. *California*, 373 U.S. 546 (1963); *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945); *Wyoming* v. *Colorado*, 298 U.S. 573 (1936); *Kansas* v. *Colorado*, 185 U.S. 125 (1902).

Unlike other interstate compacts, the Red River Compact grants jurisdiction to the federal district courts, "concurrent with that of the Supreme Court of the United States * * * in matters in which the Supreme Court * * * has original jurisdiction," over "any case or controversy involving the application or construction of this Compact," including (but not limited to) a suit between States. § 13.03, 94 Stat. 3319. This Court is therefore not the exclusive forum for resolving disputes under the Compact, even among the compacting States themselves. That consideration, however, should not weigh against review in this case, because petitioner properly invoked the district court's jurisdiction and the court of appeals' decision could prevent Texas water users from accessing in Oklahoma any portion of their State's allocated share of water.

Petitioner provides water to over two million residents of north central Texas. Pet. 3. Petitioner projects that that population will double by 2060 and that the demand for water will exceed supply by more than 400,000 acre feet per year by that time. *Ibid.* Whether petitioner can obtain a portion of Texas's share of Reach II, Subbasin 5 water from within Oklahoma could have a major impact on petitioner's operations for decades to come. Under these circumstances, this Court's review is warranted. See Sup. Ct. R. 10(c) (certiorari is warranted when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court").

2. Respondents contend (Br. in Opp. 16, 17-18) that the Compact should not be interpreted without the participation of the States themselves. That contention is not a basis for denying review here. The Tenth Circuit has already interpreted the Compact without the compacting States themselves as parties, and the question is whether that interpretation should be permitted to stand. This Court has previously resolved disputes over the interpretation of a Compact without the involvement of the compacting States. See, *e.g.*, *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110-111 (1938).

Furthermore, the State of Texas has filed an amicus brief stating that petitioner "is an entity created under Texas law that is duly authorized to acquire water from sources outside of Texas," Texas Amicus Br. 1, expressing Texas's interpretation of the Compact, and urging the Court to grant review. Respondents are state officials who are represented by the Oklahoma Attorney General's Office. In these circumstances, the absence of Oklahoma and Texas as formal parties should not present an obstacle to this Court's review of the questions presented.

Although respondents maintain (Br. in Opp. 16) that the Tenth Circuit's legal rulings would not bind the States, that is unclear at least with respect to Oklahoma, given its Attorney General's representation of state officials in the case. Cf. *Heckman* v. *United States*, 224 U.S. 413, 444-446 (1912). The decision would in any event be controlling precedent in a suit brought by Texas or another entity in a district court in the Tenth Circuit. And of course the Tenth Circuit's ruling prevents petitioner itself from accessing water in Oklahoma.

3. Although the specific question of Compact interpretation presented in the petition thus can appropriately be resolved by the Court in this case, there are many other issues that could bear on whether petitioner ultimately could obtain a permit to divert water from the Kiamichi River in Oklahoma. For example, although Section 5.05(b)(1) may allow Texas water users to access some portion of Texas's allocated share of Reach II, Subbasin 5 water in Oklahoma, that ability would not directly entitle petitioner to a permanent appropriation of 310,000 acre feet per year of surface water from Reach II, Subbasin 5, as petitioner has sought in its permit application filed with respondents. Texas is not entitled to a fixed quantity of water under the Compact; it is entitled to use 25 percent of the excess water in the subbasin, and that quantity will change every year. § 5.05(b)(1), 94 Stat. 3311.

There could also be factual and legal questions regarding how much water is available at any given time for the compacting States to divide equally among themselves. The United States is currently involved in litigation over the asserted rights of the Choctaw and Chickasaw Nations to water within their historic treaty territory, which includes areas encompassed by Reach II, Subbasin 5 and other subbasins flowing into Subbasin 5. See *Oklahoma Water Res. Bd* v. *United States et al.*, No. 5:12-cv-00275-W (W.D. Okla.). The Compact expressly states that "[n]othing in this Compact shall be deemed to impair or affect the powers, rights, or obligations of the United States, or those claiming under its authority, in, over and to water of the Red River Basin." § 2.07, 94 Stat. 3306. Accordingly, water rights of the Tribes may be relevant to the amount of excess water available.

Moreover, assuming that the Compact does not permit Oklahoma to completely foreclose Texas from diverting any portion of its allocated water within Oklahoma, there would be a further question whether the Compact entitles each State to divert Reach II, Subbasin 5 water out-of-state as a matter of course, or whether a State may be entitled to do so only when it cannot obtain full access to its equal share of water from within its own boundaries. Depending on how the Compact is interpreted in this respect, the factual question of whether Texas can access its equal share of water within its boundaries, a question the lower courts refused to consider, Pet. App. 44a n.3, may be relevant to whether the Compact allows petitioner to divert Reach II, Subbasin 5 water in Oklahoma. The competing interests of water users in Oklahoma and other compacting States in diverting water from a particular point within the subbasin, in addition to environmental and other restrictions, may also be relevant to whether a particular out-of-state diversion should be allowed.

Accordingly, if the Court grants certiorari and holds that Oklahoma may not categorically foreclose access in Oklahoma to Texas's allocated share of Reach II, Subbasin 5 water, further proceedings would be required either on remand in this case or in other proceedings, perhaps involving additional parties (*e.g.*, in a suit between or among compacting States), to address these additional issues to the extent they are relevant. Alternatively, after considering the matter, the Court may elect to address certain legal issues—*e.g.*, rejecting application of the presumption against preemption and the court of appeals' misreading of the general Compact provisions concerning the States' administration of water rights—and then remand to the district court for

consideration of whether Texas may access its share of Reach II, Subbasin 5 water in Oklahoma, taking into account any relevant legal and factual issues concerning the extent of Texas's ability to obtain Subbasin 5 water within its boundaries.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2012

AMICUS CURIAE BRIEF

FEB 21 2012
CORD
AND
PIEFS

No. 11-889

In The
Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,

Petitioner,

v.

RUDOLF JOHN HERRMANN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* CITY OF IRVING, TEXAS, CITY OF HUGO, OKLAHOMA, AND HUGO MUNICIPAL AUTHORITY IN SUPPORT OF PETITIONER

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MOTION OF HUGO MUNICIPAL AUTHORITY FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b), the Hugo Municipal Authority ("HMA") respectfully moves for leave to file the attached brief as *amicus curiae*, jointly with the City of Irving, Texas and the City of Hugo, Oklahoma (collectively with HMA, "Hugo"). Petitioner has consented to Irving and Hugo's filing of this brief, and their written consent has been filed with the Clerk of the Court. Notwithstanding the timely notice provided to all counsel of record pursuant to Rule 37.2(a), counsel for respondents made no response giving their written consent to this filing. HMA therefore moves for leave to file this brief in support of Petitioner.

The nature of HMA's interest in the Court's consideration of this Petition is intertwined with the interests of the City of Irving and the City of Hugo, set forth more fully in the attached Brief of *Amici Curiae*.

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BRIEF OF *AMICI CURIAE* CITY OF IRVING, TEXAS, CITY OF HUGO, OKLAHOMA, AND HUGO MUNICIPAL AUTHORITY IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

The Tenth Circuit's decision, construing the Red River Compact to authorize facially discriminatory state legislation obstructing interstate commerce in water (an increasingly scarce, valuable and essential natural resource), should be reviewed by this Court. It is contrary to the standard announced in this Court's landmark opinion in *Sporhase v. Nebraska*, establishing that water is an article of interstate commerce subject to the dormant Commerce Clause.[2] If not reviewed, the precedent of the Tenth Circuit's decision could provide a basis for comparable

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[1] Pursuant to Rules 37.4 and 37.6, the disclosure requirement does not apply to the City of Irving, the City of Hugo, or the Hugo Municipal Authority, as an Oklahoma public water trust formed for the benefit of the City of Hugo. Nonetheless, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2(a), counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief. Petitioner has consented to Irving and Hugo's filing, and their written consent has been filed with the Clerk of the Court. Counsel for respondents have made no response to that notice.

[2] 458 U.S. 941, 954 (1982) ("Our conclusion that water is an article of commerce raises, but does not answer, the question whether the Nebraska statute is unconstitutional.").

restraints on interstate commerce in water throughout the western United States because most interstate water apportionment compacts among the Western States contain language comparable to the Red River Compact provisions that served as the basis for the Tenth Circuit's authorization of discriminatory legislation.

The interests of the City of Hugo, Oklahoma and the Hugo Municipal Authority (collectively "Hugo") and the City of Irving, Texas ("Irving") underscore the seriousness of Oklahoma's discriminatory legislation and the Tenth Circuit decision regarding the dormant Commerce Clause. Irving, a growing Texas municipality with projected water needs that far exceed current supplies, entered into a contract, the Irving-Hugo Agreement, to purchase water from Hugo to meet those needs. Hugo currently holds water rights from the State of Oklahoma for 30,500 acre-feet per year and has a pending application to appropriate significant additional supplies.

Irving and Hugo's exercise of their respective rights and obligations under the Irving-Hugo Agreement is restricted, if not outright prohibited, by the same Oklahoma statutes that are being challenged by Petitioner. Irving and Hugo brought their own suit for declaratory judgment and injunctive relief,

challenging these Oklahoma statutes under the dormant Commerce Clause.[3]

The water that is the subject of the Irving-Hugo Agreement is part of Reach II, Subbasin 1 of the Red River Basin, the waters of this Subbasin 1 being apportioned to the State of Oklahoma under the Red River Compact. See Red River Compact, Pub. L. No. 96-564, 94 Stat. 3305 (1980), § 5.01. Thus, the Tenth Circuit's holding, in Petitioner's case, that "the Red River Compact insulates Oklahoma water statutes from dormant Commerce Clause challenge insofar as they apply to surface water subject to the Compact" also forecloses Irving and Hugo's ability to obtain judicial relief under the Commerce Clause and thus to proceed with their interstate water project involving Compact water. See App. at 51a.[4]

Irving and Hugo are local governments who have the authority and bear the responsibility to manage water resources and provide long-term water supply in their respective jurisdictions. As Petitioner has detailed, Oklahoma enjoys an abundance of water

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[3] In that case, Irving and Hugo have recently petitioned this Court for a writ of certiorari for review of the Tenth Circuit's order remanding the case for dismissal for lack of federal jurisdiction, based on its conclusion that Hugo lacks standing as an Oklahoma political subdivision to challenge the Oklahoma statutes under the Commerce Clause of the U.S. Constitution. See *City of Hugo v. Buchanan*, Docket No. 11-852.

[4] All citations in this brief to the Appendix ("App.") are to materials contained in the Appendix made part of Tarrant's Petition for a Writ of Certiorari in Docket No. 11-889.

supply far in excess of the needs in that state, and the north Texas region that includes Irving's service area is a rapidly growing metropolitan area, in which cities and other water providers must seek additional sources to meet future water demands. Pet. at 3-4. Hugo is an Oklahoma appropriator of Oklahoma water, who wishes to sell and deliver some of its appropriated water, in excess of regional needs in Oklahoma, to Irving, a Texas purchaser. This is the simple and classic exercise of interstate commerce, through which the compensation paid to Hugo will substantially benefit the regional economy. Under the Tenth Circuit's analysis of the Red River Compact, however, Oklahoma's anti-export statutes will render unfeasible the Irving-Hugo Agreement particularly, and more generally will effectively preclude this needed interstate water market between willing Oklahoma water sellers and willing Texas water buyers.

As an Oklahoma water right holder of Compact water, and as parties to an interstate water sale and purchase agreement hampered by the Tenth Circuit's broad reading of congressional consent to Oklahoma's protectionist legislation, Irving and Hugo's unique perspective on this lawsuit will assist the Court in its disposition of the petition. Irving and Hugo have a direct interest in the Court's resolution of the merits of the Compact consent question presented in this case, and present relevant arguments not advanced by Petitioner that would support reversal of the Tenth Circuit decision on this issue. This brief is filed

in order to provide additional context for the far-reaching implications of the Tenth Circuit's decision.

SUMMARY OF ARGUMENT

Irving and Hugo address the first of the two questions presented by Petitioner Tarrant Regional Water District ("Tarrant"), namely whether Congress's approval of the Red River Compact ("Compact"), utilizing language common to most such interstate water compacts, "manifests unmistakably clear congressional consent to state laws that expressly burden interstate commerce in water." See Pet. at i, 14-27. This Compact consent issue is the merits issue common to both this case and Irving and Hugo's case. Because the Tenth Circuit's holding contravenes this Court's established precedent (i) requiring "expressly stated" or "unmistakably clear" congressional consent to state statutes that otherwise would violate the dormant Commerce Clause, and (ii) finding that consent lacking in equitable apportionment language of interstate water compacts, this issue requires this Court's review. Moreover, the Compact consent issue presents a substantially important legal question with implications not only for the Red River Compact and its four signatory states, but well beyond that to the dozens of interstate compacts that apportion stream water throughout the western United States using similar terms.

Although not addressed herein, *amici* Irving and Hugo also support Petitioner's legal position on its second, preemption question presented.

ARGUMENT

I. The Tenth Circuit's Analysis Of The Red River Compact Ignores This Court's Prior Analysis Regarding Water Apportionment Compacts And The Dormant Commerce Clause.

A. The *Sporhase* Court Expressly Considered And Rejected Compact Apportionment Of Interstate Water Resources As "Persuasive Evidence That Congress Consented To The Unilateral Imposition Of Unreasonable Burdens On Commerce."

The Tenth Circuit correctly recognized this Court's "*Sporhase/Wunnicke* standard for congressional consent," under which Congress's intent to immunize state statutes from dormant Commerce Clause requirements must be "expressly stated" or otherwise "unmistakably clear." App. at 19a-20a; *Sporhase v. Nebraska*, 458 U.S. 941, 960 (1982); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984). Having recited that standard, however, the Tenth Circuit dispenses with this Court's dormant Commerce Clause precedent from *Sporhase* simply by distinguishing it from this case, because *Sporhase* involved Nebraska's attempt to

regulate interstate transfer of groundwater that was not subject to an interstate compact. App. at 23a; see also *id.* at 27a.

The problem with the Tenth Circuit's shelving of *Sporhase* in its consent analysis of the language of the Red River Compact is that it thereby ignores this Court's consideration in *Sporhase* of whether equitable apportionment by an interstate water compact satisfies the congressional consent standard. The *Sporhase* Court considered and expressly rejected arguments made by Nebraska and Amici Curiae States[5] that various federal water legislation and interstate water allocation compacts reflect congressional authorization of state-adopted restrictions on interstate commerce involving water. *Sporhase*, 458 U.S. at 958. Nebraska had argued:

> Congress clearly exempted water resources from application of the Commerce Clause of the Constitution . . . by the specific approval of water appropriation compacts between states on the nation's rivers and waterways.[6]

The Amici Curiae States in their brief even more clearly, and expansively, urged:

> The amici states have enacted laws limiting or prohibiting the export of water for use

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[5] Colorado, Wyoming, Utah, Nevada, Kansas, North Dakota, South Dakota, and Missouri.

[6] Brief of Appellee at *27, *Sporhase v. Nebraska*, 458 U.S. 941 (1982), *available at* 1982 WL 608566.

> outside the boundaries of the state. These statutes are consistent with equitable apportionment decrees of this court and are necessary to implement the interstate compacts consented to by Congress. Implicit in all compacts apportioning interstate waters, and explicit in some, is the assumption that each state may prohibit the diversion of apportioned waters for use outside its boundaries.[7]

The Court could have ruled that such federal law authorities were not applicable to the (non-compact) groundwater at issue (as did the lower courts in this case), but instead it directly addressed the merits of Nebraska's argument – ruling that the proposition was incorrect and that state laws addressing water apportioned by compact are still generally subject to the constitutional restrictions of the Commerce Clause. The *Sporhase* Court explicitly considered whether interstate water compacts (or other federal water legislation) implicitly waive Commerce Clause restrictions, and ruled as follows:

> Although the 37 statutes and the interstate compacts demonstrate Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth

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[7] Brief of Amici Curiae States at *7, *Sporhase v. Nebraska*, 458 U.S. 941 (1982), *available at* 1982 WL 608568.

> Amendment, are ingredients of the *valid* state law to which Congress has deferred. Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce.

Sporhase, 458 U.S. at 959-960 (footnotes omitted, emphasis in original).

By this conclusion, the Court intentionally announced a rule that the equitable apportionment of water accomplished by interstate compacts does not waive otherwise applicable Commerce Clause restrictions. See Douglas L. Grant, *State Regulation of Interstate Water Export*, 3 WATERS AND WATER RIGHTS at 48-38 (Robert E. Beck and Amy L. Kelley, eds., 3d ed. LexisNexis/Matthew Bender 2009) ("In other words, Congress' mere consent to the water compacts was not an unmistakably clear expression of intent to authorize unreasonable state burdens on commerce.").[8] The logic of the *Sporhase* Court's treatment

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[8] See also Olen Paul Matthews & Michael Pease, *The Commerce Clause, Interstate Compacts, And Marketing Water Across State Boundaries*, 46 Nat. Resources J. 601, 635 (2006); Chris Seldin, *Interstate Marketing of Indian Water Rights: The Impact of the Commerce Clause*, 87 Cal. L. Rev. 1545, 1555 (1999).

of compact apportionment is undeniable: Equating congressional consent to the apportionment of water with consent to violate dormant Commerce Clause requirements would mean that interstate surface water apportioned by a compact is not subject to the dormant Commerce Clause, while intrastate surface water and underground water remain subject to dormant Commerce Clause restrictions.

This understanding of the *Sporhase* rule is also supported by western states' legislative responses following the Court's decision. Prior to *Sporhase*, fourteen western states limited or prohibited the export of water.[9] Following *Sporhase*, two of those embargo statutes were repealed,[10] one was struck down by a federal district court,[11] and nine states amended or adopted legislation designed at least in part to qualify under the *Sporhase* standards for permissible constraints on interstate commerce in water.[12] Like those states whose pre-*Sporhase* export statutes were repealed or stricken, so also these nine

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[9] See generally Richard S. Harnsberger, Josephine R. Potuto & Norman W. Thorson, *Interstate Transfers of Water: State Options after* Sporhase, 70 Neb. L. Rev. 754, 817 and Appendix (1991).

[10] COLO. REV. STAT. § 37-81-101 (1973) (repealed 1983); WYO. STAT. § 41-3-105 (1977) (repealed 1983).

[11] N.M. STAT. ANN. § 72-12-19 (1978) (repealed 1983); see *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983).

[12] See Harnsberger et al., *supra note* 9, Appendix. Whether such legislation actually satisfies *Sporhase* standards is undetermined.

states (Arizona, Idaho, Kansas, Montana, Nebraska, Nevada, Oregon, South Dakota and Utah) are all "compact states." This state-level response to this Court's *Sporhase* analysis reflects a clear and shared understanding that the dormant Commerce Clause still limits a state's ability to embargo export of its water resources, even where the state is party to one or more interstate water compacts.

Because the Tenth Circuit's decision contravenes the precedent established by *Sporhase*, this Court's review is warranted. As discussed further below, the various provisions of the Red River Compact on which the Tenth Circuit relied to find "broad regulatory authority," see App. at 25a, 27a, for the "Compact states to protect their apportionments of water," App. at 3a, see also App. at 27a, are typical of the terms of many other interstate water compacts involving vast amounts of water resources throughout the western United States. This case therefore presents an appropriate vehicle by which this Court may determine whether to affirm, or to modify, its conclusion in *Sporhase* that equitable apportionment alone does not manifest congressional intent to insulate a state's discriminatory water statutes from Commerce Clause scrutiny.

B. Under The *Sporhase* Analysis Of Compact Consent, The Red River Compact Provisions On Which The Tenth Circuit Relied Do Not Supply "Unmistakably Clear" Evidence Of Congressional Consent.

This Court's review of the Tenth Circuit's Compact consent analysis is substantially important because that analysis of the language of the Red River Compact does not follow the rule set out in *Sporhase*. The various terms, provisions, and phrases in the Red River Compact on which the Tenth Circuit relied are common provisions found in nearly all of the many interstate water compacts among the western states, and are not properly read to immunize the signatory states from dormant Commerce Clause protections. As this Court noted in *Sporhase*, such interstate compacts are "agreements among States regarding rights to surface water." *Sporhase*, 458 U.S. at 959. In this context, general provisions regarding a compact purpose of apportionment of the water resources of a particular basin are certainly not remarkable. Indeed, a comparative review of certain key provisions of the 21 western interstate water compacts demonstrates that all of these compacts have the nature or purpose of apportionment.[13]

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[13] Irving and Hugo had compiled such a comparative review of the terms and provisions of these western interstate compacts, which was made part of the record in their appeal before the Tenth Circuit. Cf. *City of Hugo v. Nichols*, 656 F.3d 1251 (2011)

(Continued on following page)

As Petitioner has set out, the "non-interference" provision of the Red River Compact is also common language found in other interstate water apportionment compacts. See Red River Compact, § 2.10, App. at 87a; Pet. at 18, 25 & n. 12. Such general provisions reflect Congress's general deference to state water law, stated in numerous federal statutes including compact ratifications, which this Court acknowledged but found insufficient to immunize water compact states from dormant Commerce Clause prohibitions. See *Sporhase*, 458 U.S. at 959-960. Nearly all of the other western states' water compacts also contain this type of provision.[14]

(consolidated Case Nos. 10-7043 and 10-7044). Accompanying the filing of this brief, pursuant to Rule 32.3 *amici* are submitting a letter to the Clerk of the Court describing the material comprising this comparative review and proposing that it be lodged for the Court's consideration of this Petition.

[14] See Arkansas River Basin Compact, 87 Stat. 569 (1973), art. XI(B); Arkansas River Basin Compact, 80 Stat. 1409 (1966), art. XIII(B); Arkansas River Compact, 63 Stat. 145 (1949), art. VI(A); Big Blue River Compact, 86 Stat. 193 (1972), § 7.2(3); Canadian River Compact, 66 Stat. 74 (1952), art. X(d); Colorado River Compact, 45 Stat. 1057, 1064 (1928), art. IV(c); Pecos River Compact, 63 Stat. 159 (1949), art. VIII; Republican River Compact, 57 Stat. 86 (1943), art. IV; Sabine River Compact, 68 Stat. 690 (1954), *as amended by* 76 Stat. 34 (1962), art. II; Snake River Compact, 64 Stat. 29 (1950), art. IX; Yellowstone River Compact, 65 Stat. 663 (1951), art. XVIII. In the cases of water apportionment compacts that (i) include provisions for basin-wide treatment of certain issues, across state lines, or (ii) do not establish a compact commission, and thus do not require a clarification of state vs. compact commission authority, such a "non-interference" provision would not be expected, and is not

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Even the Tenth Circuit's emphasis on the "free and unrestricted use" phrasing, in the Red River Compact provisions that allocate water resources for specific "reaches" and "subbasins" among the signatory states, does not satisfy this Court's standard for unmistakably clear congressional consent. App. at 26a; see App. at 87a § 4.02 (Reach I, Subbasin 2, water the subject of two of Petitioner's permit applications to OWRB); see also Red River Compact, § 5.01 (Reach II, Subbasin 1, water the subject of Hugo's permit applications pending with OWRB). Again, this is common water apportionment compact language – 11 of 18 western states' compacts recognize the right of "free and unrestricted" use (or comparable authorization) of water allocated to a state by the compact.[15]

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found. See Costilla Creek Compact, 77 Stat. 350 (1963), *amending* 60 Stat. 246 (1946); Klamath River Basin Compact, 71 Stat. 497 (1957); Upper Colorado River Basin Compact, 63 Stat. 31 (1949) (basin-wide treatment); and South Platte River Compact, 44 Stat. 195 (1926); La Plata River Compact, 43 Stat. 796 (1925) (no compact commission).

[15] See Arkansas River Basin Compact, 87 Stat. 569 (1973), art. IV; Arkansas River Basin Compact, 80 Stat. 1409 (1966), art. V; Bear River Compact, 94 Stat. 4 (1980), *amending* 72 Stat. 38 (1958), art. V(A); Big Blue River Compact, 86 Stat. 193 (1972), § 5.2; Canadian River Compact, 66 Stat. 74 (1952), art. IV(a); Colorado River Compact, 45 Stat. 1057, 1064 (1928), art. III(a); La Plata River Compact, 43 Stat. 796 (1925), art. II(1), (2)(a); Sabine River Compact, 68 Stat. 690 (1954), *as amended by* 76 Stat. 34 (1962), art. IV; South Platte River Compact, 44 Stat. 195 (1926), art. III; Upper Niobrara River Compact, 83 Stat. 86 (1969), art. V(A)(1). The three compacts that utilize a basin-wide administration approach, discussed above, are excluded from this aspect of the comparative analysis because of their

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The Tenth Circuit incorrectly and overbroadly interprets the phrase "free and unrestricted use" to give a signatory state, in this case Oklahoma, a complete and prospective blank check to discriminate against out-of-state water marketing and use.

Examination of two other compact examples further establishes that this interpretation of "free and unrestricted use" is not legally sound. First, one of the interstate stream compacts (to which Nebraska is a party) offered for this Court's consideration in *Sporhase* also includes such provisions. See South Platte River Compact, 44 Stat. 195 (1926), art. III (apportioning tributary waters of Lodgepole Creek, with Nebraska having "the full and unmolested use and benefit of all waters" above the designated point of diversion, and Colorado having "the exclusive use and benefit" of all waters flowing at or below that point). The *Sporhase* Court, however, concluded that "the interstate compacts . . . do not indicate that Congress wished to remove federal constitutional constraints on such state laws." *Sporhase*, 458 U.S. at 959-960.

Second, among the western states' water apportionment compacts there are several that, in sharp contrast to the Red River Compact's provisions, "specifically require consent from the signatory states or from a compact commission before water can be

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fundamentally different approach, disregarding state boundaries.

exported outside the river basin." Grant, 3 WATERS AND WATER RIGHTS at 48-38 & n. 220.[16] Typical of such express export consent requirements, Section 5.4 of the Kansas-Nebraska Big Blue River Compact provides: "Neither state shall authorize the exportation from the Big Blue river of water originating within that basin without the approval of the [compact agency's] administration." But Section 5.3 of that same compact also provides: "The State of Kansas shall have *free and unrestricted use* of all waters of the Big Blue River Basin flowing into Kansas from Nebraska in accordance with this Compact. . . ." (emphasis added). If "free and unrestricted use" signifies the outright and absolute power of a compact state to regulate its allocated water even to the point of discriminating against water export, as the Tenth Circuit believes, it is difficult to see how such authorization could be harmonized within a compact that requires approval by another entity before the signatory state can authorize water export.

On the contrary, like the many other compact examples including provisions for "free and unrestricted use" by a state of its compact-allocated water, these provisions in the Red River Compact do not carry the legal weight that the Tenth Circuit has afforded them. None of the provisions on which the

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[16] See Kansas-Nebraska Big Blue River Compact, art. V, § 5.4, 86 Stat. 193, 197 (1972); Snake River Compact, art. IV, 64 Stat. 29, 31 (1950); Yellowstone River Compact, art. X, 65 Stat. 663, 669 (1951).

court relied to foreclose dormant Commerce Clause challenges to Oklahoma's anti-export statutes is anything more than the typical compact apportionment language considered and rejected by the *Sporhase* Court. The Tenth Circuit's reading of what it considers to be "broad language of key Compact provisions," App. at 24a, that "give the Oklahoma Legislature wide latitude to regulate interstate commerce in its state's apportioned water," App. 27a, is manifestly based on the court's failure to follow this Court's *Sporhase* analysis of compact provisions. Evaluated with that guidance, nothing in the Red River Compact approaches satisfying this Court's "unmistakably clear" standard for congressional consent.

II. The Common Provisions Of Equitable Apportionment Compacts Also Demonstrate The Far-Reaching Implications Of The Tenth Circuit's Flawed Compact Consent Analysis, And The Need For This Court's Review.

Comparison of specific language in the Red River Compact to the terms and conditions of other interstate water apportionment compacts is not only necessary to determine whether congressional approval of the Compact amounts to "unmistakably clear" authorization of otherwise prohibited restrictions on interstate commerce, it also highlights for this Court the vast legal and economic implications of leaving the Tenth Circuit's Compact consent

holding in place. Most of the major stream water sources in the western United States are subject to interstate equitable apportionment compacts. Comparative consideration of these compacts' terms makes abundantly clear that the Tenth Circuit's interpretation of language in the Red River Compact would equally apply to the terms of numerous other compacts, and thus the laws of numerous other compact states.

Unconstrained by the Commerce Clause, and emboldened by the "wide berth" described by the Tenth Circuit, App. at 28a, it is easy to foresee many more states taking now-sanctioned actions in the interest of gaining various forms of economic advantage by hoarding their water resources for in-state use. Indeed, there would be nothing to prevent Oklahoma and other compact states from reverting to outright embargos against export of their water resources. This is precisely the type of "economic Balkanization" the Commerce Clause intended to prevent. Cf. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). This outcome is obviously of paramount concern to cities and other water providers in areas of growing population, water shortage and recurring drought such as north Texas, but it truly begs for this Court's attention on the far larger national scale.

The Tenth Circuit concluded its opinion by stating that its role is "not to pass judgment on the economic policy implications of the Red River Compact . . . [but] to ascertain what the Compact says about state regulation of apportioned water." App. at

51a. Irving and Hugo respectfully submit that, given the flawed Compact consent analysis employed by the Tenth Circuit and the sweeping national importance of its holding, *this* Court's critically important role is either to affirm its existing compact consent analysis set out thirty years ago in *Sporhase*, or somehow to modify or reject that precedent. These challenges to the Oklahoma anti-export statutes, viewed in light of the Red River Compact, provide an appropriate vehicle to decide an issue of tremendous importance to states, local governments, water providers, and indeed all who rely on a vital market in this uniquely vital natural resource.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,

Petitioner,

v.

RUDOLF JOHN HERRMANN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF NORTH TEXAS MUNICIPAL WATER DISTRICT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF NORTH TEXAS MUNICIPAL WATER DISTRICT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The North Texas Municipal Water District ("NTMWD") supplies drinking water to over 1.5 million people in North Texas.[1] NTMWD's service area includes all or parts of Collin, Dallas, Denton, Fannin, Hopkins, Hunt, Kaufman, and Rockwall counties. NTMWD's enabling legislation authorizes it to acquire any rights in, and to storage and storage capacity in, any reservoir or other water source. Tex. Civ. Rev. Stat. art. 8280-141, § 7(a). NTMWD is also empowered to construct or otherwise acquire all works, plants, and other facilities necessary or useful for the purpose of storing, impounding, retaining, diverting, or processing this water and transporting it to cities and other areas for municipal, domestic, and industrial purposes. *Id.*

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. All parties have consented to the filing of this brief. Those consents are being lodged herewith. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

With recent severe drought conditions, and predictions of future drought conditions, NTMWD, the petitioner, Tarrant Regional Water District ("Tarrant"), and other North Texas water providers must seek additional water supplies to meet the needs of their customers, whose population continues to grow. NTMWD has taken significant efforts to combat drought conditions by implementing extensive water conservation and drought contingency measures, in accordance with its state-approved 2009 Water Conservation and Drought Contingency Plan ("Drought Plan"). NTMWD has spent almost $10 million in the last 7 years on water conservation-related public education programs, and it has developed and given away these programs for use by other public water suppliers across Texas. Because of its dwindling water resources, on November 1, 2011, NTMWD entered Stage 3 of the Drought Plan, which allows outdoor watering only once every two weeks until March 31, 2012. NTMWD expects it may be required to enter Stage 4 of the Drought Plan – which prohibits all commercial and residential outdoor watering – possibly by fall of 2012. Even with these measures, however, NTMWD requires additional water supplies to meet its customers' increasing demands for water.

In stark contrast, the State of Oklahoma is practically giving away water – discharging on average 36 million acre-feet of unused stream water into various tributaries bound for the Gulf of Mexico each year. Oklahoma uses only a drop in the bucket of the available water – just 1.87 million acre-feet of surface

water – each year. Oklahoma Water Resources Board, *Oklahoma Water Facts* (Jan. 13, 2010), http://www.owrb.ok.gov/util/waterfact.php; Oklahoma Water Resources Board, *Oklahoma Comprehensive Water Plan, Physical Water Supply Availability Report*, Table 3-21 (Nov. 2011), http://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/WaterPlanUpdate/OCWP_PhysicalWaterSupplyAvailabilityReport.pdf. Even with this vast supply of unused water, Oklahoma has actively sought to prevent any use of this water outside its borders by enacting a series of laws that effectively create an embargo on the exportation of water from Oklahoma for use in any other state ("Oklahoma Water Statutes"). See, *e.g.*, Okla. Stat. tit. 82, §§ 105.9, 105.12, 105.12A, 105.16(B), 1085.2(2), 1085.22, 1086.1(A)(3), 1086.2.

In its efforts to secure additional water supplies for its 1.5 million customers, NTMWD, like Tarrant, has filed water rights applications with the Oklahoma Water Resources Board ("OWRB"). One of NTMWD's applications seeks to appropriate water within the Kiamichi River, which is located in reach II, subbasin 5 of the Red River Basin. Consequently, NTMWD has a direct interest in this case not only because it generally seeks to secure water from Oklahoma, but because it has an existing application seeking water that is directly affected by the Tenth Circuit's decision below. Further, NTMWD is extremely concerned about the broader impacts of this decision – essentially eliminating a vast, unused supply of water from a region of Texas in desperate need

of such water for not only economic development, but to maintain the existing economy.

SUMMARY OF ARGUMENT

Water is essential to the vitality and growth of communities. In North Texas, drought conditions and an ever-growing population have created a demand for water supplies that cannot be met in the future without additional supplies. Wholesale water providers like NTMWD and Tarrant seek to meet these water demands by securing additional water – water that is available to Texas under the Red River Compact but is only accessible in Oklahoma.

The Tenth Circuit's erroneous interpretation of the plain language of the Red River Compact prevents either NTMWD or Tarrant from using those additional water supplies. If the Tenth Circuit had employed a plain language reading of the Compact, the court would have determined that the Oklahoma Water Statutes are preempted by the Compact. The plain language of the Compact, by its express terms, grants Tarrant, on behalf of Texas, an equitable apportionment of water within reach II, subbasin 5 of the Red River Basin – and that right to an equal portion is not conditioned upon such water being located within Texas.

ARGUMENT

I. The Petition Addresses an Issue With Wide-Reaching Socioeconomic Impacts Demanding this Court's Review.

Since December 21, 2010, the Governor of the State of Texas has issued an emergency proclamation every month regarding the severity of drought conditions in Texas with the most recent proclamation issued on January 26, 2012. Office of the Governor of Texas, *Gov. Perry Renews Proclamation Extending Wildfire Emergency* (2012), http://governor.state.tx.us/news/proclamation/16920/. The Texas State Climatologist paints a bleak picture of the drought in Texas, predicting that these drought conditions may continue for several years. John W. Nielsen-Gammon, *The 2011 Texas Drought: A Briefing Packet for the Texas Legislature*, at 42 (2011), http://atmo.tamu.edu/osc/press_releases/2011_drought.pdf. In North Texas, these drought conditions coupled with growing populations create a demand for water that existing water supplies cannot meet in the near future. Without adequate water supplies, the impact to North Texas's economy could be catastrophic – by stifling, if not completely halting, further economic growth and development.

During a single year in which a severe drought occurs, and water demands of the North Texas region cannot be met, the region could lose a quarter of a million residents and nearly 550,000 jobs, at a cost to the regional economy of over $61 billion. Region C Water Planning Group, *2011 Region C Water Plan*

("Region C Plan"), at ES.7 (2011), http://www.twdb.state.tx.us/wrpi/rwp/3rdRound/2011_RWP/RegionC/PDF's/Main%20Report/EXECUTIVE_SUMMARY_Final.pdf. This negative economic impact felt by North Texas would likely also cause repercussions in southern Oklahoma given the connectivity between the two regions' economies. William S. Spears School of Business, *Multi-regional Input-Output Model for the Dallas and Oklahoma City Metro. Areas*, at 7 (2010), http://economy.okstate.edu/caer/files/OKCDFW_MRIO_Final.pdf.

In an effort to ensure water supplies are available, even during drought conditions, the State of Texas develops a State Water Plan and Regional Water Plans. The regional water plan for North Texas, which includes NTMWD and Tarrant, is the Region C Water Plan. According to this regional plan, in 2060 the region will have demand of 3.3 million acre-feet of water per year – meaning it will have a shortage of 1.5 million acre-feet of water per year by 2060. Region C Plan at ES.6.

To combat this projected shortage, wholesale water providers like NTMWD and Tarrant actively seek to develop new water supplies. In fact, the Region C Water Plan identifies potential water supplies to be developed by wholesale water providers to meet the needs of the growing populations in this region. One such water supply identified for both NTMWD and Tarrant is water from the Red River Basin in Oklahoma. Region C Plan at ES.10.

State agencies like NTMWD and Tarrant must be allowed equal right to use of water that the Compact declares to be apportioned to Texas. This water will not only be used in North Texas, but the return flows will be discharged into the Trinity River Basin and subsequently reused by downstream interests, including the City of Houston. In contrast, if the water remains in Oklahoma, it will only be wasted, flowing into the Gulf of Mexico without ever being used – meaning Oklahoma can claim no harm from allowing Texas the use of water rightly apportioned to it under the Red River Compact (the "Compact"). Pub. L. No. 96-564, 84 Stat. 3305 (1930).

II. The Court Should Reverse the Decision of the Tenth Circuit and Hold that the Plain Language of the Red River Compact Preempts Oklahoma Water Statutes.

A. The Tenth Circuit Erroneously Interpreted the Plain Language of the Compact.

In failing to read the plain language of the Red River Compact, the Tenth Circuit determined in error that the Compact did not preempt the Oklahoma Water Statutes. This error resulted from the Tenth Circuit's failure to use a plain language reading of the Compact as recently employed by this Court in *Montana v. Wyoming*, 131 S.Ct. 1765 (2011).

The language agreed upon and negotiated by states in interstate compacts must be given deference

because such language is presumed to be "the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties." *New Jersey v. Delaware*, 552 U.S. 597, 615-16 (2008) (quoting *Rocca v. Thompson*, 223 U.S. 317, 332 (1912). This Court has consistently recognized the importance of the plain language in compacts. In *Texas v. New Mexico*, 462 U.S. 554 (1983), this Court was faced with the question as to whether a federal representative could act as a tie-breaker on a compact commission over a disputed issue. In looking to the plain language of the Pecos River Compact, the Court held that because the language of the compact clearly did not provide for such a tie-breaker in a compact commission, the Court was "not free to rewrite [the compact]." *Id.* at 565.

Likewise, in *Montana*, this Court again deferred to the plain language of the interstate compact at issue and refrained from rewriting the language. 131 S.Ct. at 1778-79. Montana claimed that Wyoming breached the Yellowstone River Compact by increasing their net water consumption through more efficient irrigation systems. *Id.* at 1769. Montana's claim hinged on the definition of "beneficial use," which it asserted required Wyoming to not deplete its water rights beyond pre-1950 depletion levels. *Id.* at 1778. This Court rejected Montana's assertion because "Montana's reading . . . does not follow the text [of the compact] and would drastically redefine the term

'beneficial use' from its longstanding meaning." *Id.* at 1778.

In accordance with *Montana*, the Tenth Circuit should have applied a plain language reading to the Red River Boundary Compact.

B. The Compact by its Explicit Terms Grants Texas an Equitable Apportionment of Water Regardless of State Boundaries.

Just as this Court refused to rewrite the plain language of the compacts in *Texas* and *Montana*, it should reverse the decision of the Tenth Circuit and refuse to rewrite the plain language of the Red River Boundary Compact.

Under the Compact, the Red River Basin is divided into five stream "reaches" that are in turn divided into subbasins. Within reach II, subbasin 5, the apportionment of which is at issue in this case, the Compact provides the signatory States "equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second." Compact § 5.05(b)(1). Of significant note, reach II, subbasin 5 of the Red River does not flow into or through Texas, meaning Texas can only

acquire its water allocation in this reach by securing such water from Oklahoma.

In addition to this specific language regarding allocation of water, the Compact also includes general provisions that set forth how the signatory States are to use these water allocations. Under Section 2.01, the Compact provides that "[e]ach state may freely administer water rights and uses in accordance with the laws of that state, *but* such uses shall be subject to availability of water in accordance with the apportionments made by this Compact." Compact § 2.01 (emphasis added). Another general provision used in virtually every interstate water compact also provides that "[n]othing in this Compact shall be deemed" to "interfere with or impair the right . . . of any Signatory State to regulate within its boundaries the appropriation, use, and control of water" as long as that right is "not inconsistent with its obligation under this Compact." *Id.* § 2.10(a).

In reading the Compact, particularly the above-discussed provisions, the Tenth Circuit failed to grasp its plain language. The Compact sets forth that signatory states are granted "equal rights to the use of" the water within reach II, subbasin 5. Compact § 5.05(b)(1). Instead of holding that Texas, specifically Tarrant, has equal rights to that water, the Tenth Circuit instead read Section 2.01 as granting signatory states "broad discretion to regulate the use of their water apportionments," meaning Oklahoma Water Statutes were not preempted by the Compact and could effectively prevent Texas from securing its

share of water that is only accessible in Oklahoma. *Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d 1222, 1242 (10th Cir. 2011), *petition for cert. filed*, (No. 11-889, 2011 Term). But the Tenth Circuit's reading ignores the plain language in the Compact that makes a signatory state's free administration of water rights expressly subject to "the availability of water in accordance with the apportionments made by this Compact." Compact § 2.01. Moreover, the Compact's plain language apportions to each signatory State "equal rights to the use of" the water in reach II, subbasin 5, and each State is entitled to not "more than 25 percent of the water in excess of 3,000 cubic feet per second." Compact § 5.05(b)(1). A plain reading of this language can only result in a determination that Tarrant, on behalf of Texas, has a right to its equal apportionment of water in the reach even though such reach is in Oklahoma. No further interpretation of the Compact is necessary to make this determination because the plain language is clear as to the Compact's meaning.

Making every effort to avoid preemption of the Oklahoma Water Statutes, even though that effort is contrary to law, the Tenth Circuit is saying essentially that a signatory State's equal right to use of water is in fact *unequal* if that State is unable to secure such water within its own borders. In fact, the Tenth Circuit in essence has rewritten Section 5.05(b)(1) to read that "[t]he Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into

subbasin 5 *if and only if such water is accessible within the borders of such State.*" But, that is not what the plain language of the Compact provides.

This Court has made clear that it cannot re-write the terms of a Compact. The Compact contains no provision prohibiting Texas from accessing its equal share of water in Oklahoma, and thus, Texas is free to enter Oklahoma to access such water as an article of commerce. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982); *Altus v. Carr*, 255 F. Supp. 828, 839-40 (W.D. Tex. 1966), *aff'd*, 385 U.S. 35 (1966). The Tenth Circuit should have followed the decision in *Montana* and should have interpreted the plain language of the Compact as requiring that Tarrant be given an equal right to use of water within the reach II, subbasin 5 even if such water is only accessible in the State of Oklahoma.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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BRIEFS

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In the Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
Petitioner,

v.

RUDOLF JOHN HERRMANN, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The State of Texas has a substantial interest in the Court granting the petition and reversing the Tenth Circuit's judgment. Petitioner, Tarrant Regional Water District, is an entity created under Texas law that is duly authorized to acquire water from sources outside of Texas. The Tenth Circuit's judgment thwarts Tarrant's ability to obtain water supplies within the Oklahoma portion of the Red River Basin that Texas has "equal rights" to use under the Red River Compact. Texas has an interest in ensuring that Oklahoma is not permitted to undermine its compact commitments by force of its own protectionist water legislation.

DISCUSSION

I. THE TENTH CIRCUIT'S DECISION DEPRIVES TARRANT OF CRITICAL WATER RIGHTS AND THREATENS TO WASTE MASSIVE AMOUNTS OF WATER.

There is perhaps no natural resource more critical to a population's survival than water. People depend on water for daily life, production of food, and support of industry. In light of this pressing need, the States have, for decades, negotiated water compacts to define and control the equitable allocation of water that traverses shared borders. The Red River Compact is

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1. Pursuant to Supreme Court Rule 37.2(a), the State of Texas provided counsel of record for all parties with timely notice of the intent to file this brief. Consent of the parties is not required for the States to file an amicus brief. SUP. CT. R. 37.4

one such compact joined by the States of Arkansas, Louisiana, Oklahoma, and Texas.

1. Tarrant is one of the largest raw-water suppliers in the State of Texas. It provides water to more than 1.7 million people in the North Central Texas area and serves more than 30 wholesale customers, including the cities of Fort Worth, Arlington, and Mansfield, as well as the Trinity River Authority.[2] As such, Tarrant is one of the primary beneficiaries of Texas's water rights under the Red River Compact.

Under the plain terms of the Compact, Texas is entitled to enjoy, among other things, "equal rights to the use of" certain water in Reach II, Subbasin 5, which traverses Oklahoma, Texas, and Arkansas. Pet. App. at 88-89 (Compact, § 5.05(a)-(b)(1)). Nonetheless, the Tenth Circuit has concluded that Oklahoma may impose its discriminatory laws to prevent Texas appropriators like Tarrant from acquiring Texas's rightful share of water from the subbasin, simply because the water is located within the physical boundaries of Oklahoma. If allowed to stand, Tarrant and other North Texas appropriators stand to lose billions of gallons of water every year that they desperately need—and have a right to use under the Compact.[3]

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2. Tarrant Regional Water District Website, About Us, http://www.trwd.com/overview.aspx.

3. As explained by Tarrant, its demand for water will exceed supply by more than 400,000 acre-feet (approximately 130 billion gallons) per year by 2060. *See* Pet. at 3.

Indeed, every gallon of water matters. Tarrant (and three other large water providers) provide 85 percent of the water used in Texas's Region C.[4] Region C is heavily urbanized, with 81 percent of the population living in cities with populations in excess of 20,000 people.[5] The two most populous counties in Region C, Dallas and Tarrant, have 65 percent of the region's population.[6] The region has and will continue to experience explosive population growth in the upcoming decades.[7] As of the 2000 Census, the population of Region C was 5,254,722, comprising 25.2 percent of Texas's total population.[8] The estimated population as of 2008 was 6,347,000, an increase of 21

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4. TEX. WATER DEV. BD., 2011 Region C Water Plan at ES.4, *available at* http://www.twdb.state.tx.us/wrpi/rwp/3rdround/2011RWP.asp (From link, click on Region C, PDFs, Main Report, Executive Summary).

5. *Id.* at ES.3.

6. *Id.* Region C is home to the Dallas-Fort Worth Metroplex, which is the fourth largest metropolitan area in the United States. BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, *News Release: GDP by Metropolitan Area, Advance 2010, and Revised 2007-2009*, Sept. 13, 2011, http://www.bea.gov/newsreleases/regional/gdp_metro/2011b/gdp_metro0211b.htm; *see also* AM. FACT FINDER, U.S. CENSUS BUREAU, *Population and Housing Occupancy Status: 2010 - United States*, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_NSRD_GCTPL2.US24PR&prodType=table.

7. 2011 Region C Water Plan, *supra* note 4, at ES.3-4.

8. *Id.* at ES.3.

percent.[9] The Region C planning group projects that by 2030, the area's population will increase to over 9 million, and to over 13 million by 2060.[10]

This increase in population comes with a predictable increase in demand for water. The Region C planning group anticipates that demand for water will increase from its current level of approximately 1.75 million acre-feet per year to 2.4 million acre-feet per year in 2030, and 3.3 million acre-feet by 2060.[11]

Compounding the natural challenges that arise from population growth is the Texas drought. Year 2011 ranks as the worst one-year drought in Texas's history.[12] And weather experts predict that the current drought will persist at least into 2012, and possibly for the next decade.[13]

Plainly, Tarrant and its fellow North Texas appropriators have their work cut out for them. They must acquire increasing supplies of water to support a rapidly expanding population under dire natural

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9. *Id.*

10. *Id.* at ES.4.

11. *Id.* at ES.5.

12. TEX. WATER DEV. BD., *Water for Texas 2012 State Water Plan* at 14, *available at* http://www.twdb.state.tx.us/publications/state_water_plan/2012/2012_SWP.pdf.

13. *Id.* at 155 (citing posting of John Nielsen-Gammon to Climate Abyss blog, http://blog.chron.com/climateabyss/2011/09/the-drought-of-record-was-made-to-be-broken (Sept. 22, 2011, 16:57 CTS)).

circumstances. The possibility of failure is quite real, and it would come at a severe price: By 2060, if water demands in Region C are not met, projected annual income will be reduced by over $49 billion. Over $3 billion in state and local business taxes will be lost. And in excess of 546,000 jobs will be lost, leading to an inevitable decline in population of 796,606 people.[14]

2. To make matters worse, Oklahoma has no use for the water at issue. The Oklahoma Water Resources Board ("OWRB") openly acknowledges that Oklahoma possesses water in abundant supply, and that the amount of water sought by Tarrant "would not affect present or future needs in central Oklahoma."[15] In the words of the OWRB:

> [T]he six major river basins in southeast Oklahoma produce, in an average year, more than three times the amount of water than the entire State of Oklahoma uses annually for all purposes . . . . The flows of the six river basins could support three cities the size of New York City in southeast Oklahoma and have sufficient water supplies left over for other purposes.[16]

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14. *Id.* at 184, Table 6.5.

15. OKLA. WATER RES. BD., *Status Report to the Governor, Joint State/Tribal Water Compact and Water Marketing Proposals, Southeast Oklahoma Water Resources Development Plan* at 30, http://www.owrb.ok.gov (From link, click on legislative, Southeast Oklahoma Water Development Plan, Report).

16. *Id.* at 27.

No wonder, then, that both sides of this litigation have long recognized that it makes sense from both an economic and a resource standpoint[17] for Oklahoma to allow North Texas appropriators access to Oklahoma water in quantities that could help solve North Texas's water shortages through at least 2060 (without harm to Oklahoma).[18]

But instead of allowing Tarrant access to water that Texas is rightfully entitled to use under the Red River Compact, Oklahoma enacted discriminatory laws preventing that access. The result of Oklahoma's economic protectionism is the ongoing flow of billions of gallons of water, unused, into the Gulf of Mexico.

3. The Tenth Circuit's decision upholding Oklahoma's protectionist laws destroys Tarrant's ability to acquire necessary water from one of the most economically sensible and environmentally appropriate resources available—putting at risk for insufficient water one of the most populous and productive areas of the country. The potentially devastating and long-lasting consequences of this decision justify the Court's

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17. TEX. WATER DEV. BD., 2011 Region C Water Plan at App. P., *available at* http://www.twdb.state.tx.us/wrpi/rwp/3rdround/2011RWP.asp (From link, click on Region C, PDFs, Appendices, Appendix P) (identifying water from Oklahoma as a highly stable, affordable, and environmentally friendly resource).

18. Status Report to the Governor, *supra* note 15, at 25-30. *See also* 2011 Region C Water Plan, *supra* note 4, at ES.10 (Table ES.1), 4E.3-4 (From link, click on Region C, PDFs, Main Report, Chapter 4E).

swift intervention now, even in the absence of a division of opinion among the circuit courts of appeals. *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 505-506 (2007). There is nothing to be gained by waiting for more percolation in the courts of appeals. Quite the contrary, the Court should act now to discourage other State parties to the Red River Compact (or one of the other many such agreements among other States) from retaliating with similarly protectionist legislation.

II. THE TENTH CIRCUIT EMPLOYED AN IMPROPER PRESUMPTION AGAINST PREEMPTION IN UPHOLDING OKLAHOMA'S PROTECTIONIST WATER STATUTES AGAINST TEXAS'S SUPERIOR "RIGHT[] TO THE USE OF" WATER LOCATED ANYWHERE WITHIN REACH II, SUBBASIN 5 OF THE RED RIVER COMPACT.

In addition to the practical reality that the Tenth Circuit's judgment will deprive North Texans of readily available water, it is also wrong in both its interpretation of the Compact and in its use of a supposed presumption against preemption to uphold Oklahoma's discriminatory water laws.

This Court is the ultimate arbiter of interstate-compact disputes. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) (The Court "must have final power to pass upon the meaning and validity of compacts."). Whether the Red River Compact conflicts with—and therefore preempts—Oklahoma's challenged water-permitting scheme boils down to a question of compact interpretation. *Cf. Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110-11

(1938) (Court may determine the effect of an interstate compact even where the contracting States are not parties to the suit).

Relying upon a presumption against implied preemption of state laws, the Tenth Circuit determined that Section 5.05(b)(1) of the Compact could be squared with Oklahoma's challenged statutes by narrowly construing each Signatory State's "equal rights to the use of" water located in Reach II, Subbasin 5 of the Compact to include only water from within each State's own physical boundaries—even though Subbasin 5 traverses state lines. The court's reliance upon the presumption was misplaced. Because the presumption against preemption is designed to preserve the States' ability to legislate alongside Congress, *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009), it should not be applied in the context of interpreting the meaning of an interstate compact that was negotiated by several States themselves.

Under the plain terms of Section 5.05(b)(1), Texas enjoys "equal rights" to use water that originates or flows into Subbasin 5. Moreover, during ordinary flow conditions, Section 5.05(b)(1) expressly "entitle[s]" each Signatory State to use up to 25% of Subbasin 5 water (in excess of 3000 cubic feet per second) without respect to state borders. Pet. App. at 88-89. In other words, the Compact provides Texas with the right to appropriate its equitable share of water from anywhere within the subbasin—including that portion of the subbasin that sits within Oklahoma—so long as Texas does not exceed its 25% allotment.

Tarrant's ability to appropriate Texas's share of Subbasin 5 water from within the physical boundaries of Oklahoma is undisputedly impeded by Oklahoma's discriminatory laws, which effectively prohibit out-of-state appropriators from obtaining water from within Oklahoma. The Court's review is necessary to ensure that States may not freely violate their compact obligations under the cover of their own legislation.

A. The Compact Must Be Read According to Its Plain Terms—Not with a Presumption Against Preemption of Conflicting State Laws.

1. An interstate compact approved by Congress is federal law. *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). At the same time, a compact is a type of contract that is construed according to ordinary principles of contract law. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987); *see also Kansas v. Colorado*, 533 U.S. 1, 20-21 (2001) (O'Connor, J., concurring in part and dissenting in part). The primary goal of contract interpretation is to effectuate the contracting parties' intent. *See Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 370-71 (1984). That is accomplished by adhering to and enforcing the "plain terms" of the contract. *Montana v. Wyoming*, 131 S. Ct. 1765, 1779 (2011); *see also New Jersey v. Delaware*, 552 U.S. 597, 615-16 (2008) ("Interstate compacts, like treaties, are presumed to be 'the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the

purposes of the high contracting parties.'") (citing *Rocca v. Thompson*, 223 U.S. 317, 332 (1912)).

Faced with Tarrant's Supremacy Clause challenge to Oklahoma's water-permitting scheme, the Tenth Circuit disregarded these cardinal tools of compact construction and instead interpreted the Red River Compact under the distorting effect of a "presumption against implied conflict preemption." *See* Pet. App. at 34-35, 40-41, 43.

2. The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Consistent with the express command of the Supremacy Clause, state laws that conflict with federal law are "without effect." *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008) (citation omitted). That bedrock and seemingly straightforward principle of constitutional law is far easier to recite than to apply. Indeed, the standard used to determine whether federal law actually conflicts with state law is itself unclear.

In the absence of an express preemption clause, the Court generally has employed a presumption against implied conflict preemption, under which federal law is construed to avoid a conflict with state law to the extent possible. *See, e.g., Wyeth*, 555 U.S. at 565. On the other hand, the Court also has held that the presumption against implied conflict preemption should not be used to interpret the "substantive . . . *meaning*" of federal law—at least when there is no doubt that the law is intended to preempt state laws.

Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 743-44 (1996) (the "meaning" of a federal statute is a separate question from "whether" it is preemptive) (emphasis in original); *see also Cuomo v. The Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710, 2733 (2009) (Thomas, J., concurring in part and dissenting in part) (The act of statutory construction "may clarify the pre-emptive scope of enacted federal law . . . .").

In the Court's most recent treatment of conflict preemption, the majority did not apply any presumption against implied preemption in determining that Minnesota's and Louisiana's failure-to-warn laws conflicted with—and were therefore preempted by—federal drug-labeling regulations applicable to generic drugs. *See PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577-78 (2011). Writing for a four-justice plurality, Justice Thomas went further, expounding that courts "should not strain to find ways to reconcile federal law with seemingly conflicting state law," but should instead "look no further than 'the ordinary meanin[g]' of federal law" without "distort[ing] federal law to accommodate conflicting state law." *Id.* at 2580 (citations omitted); *but see id.* at 2583 (Sotomayor, J., dissenting) ("[A] plurality of the Court tosses aside our repeated admonition that courts should hesitate to conclude that Congress intended to pre-empt state laws governing health and safety.").

3. Despite the underlying uncertainty over the proper tool of construction for interpreting federal statutes and regulations in a typical conflict-preemption analysis, the presumption against

preemption should not have been applied in this case, where the federal law at issue is an interstate compact. The Court utilizes the presumption out of "respect for the States as 'independent sovereigns in our federal system,'" under the assumption that Congress does not "cavalierly" intend to eliminate the States' ability to enact and enforce their laws. *Wyeth*, 555 U.S. at 565 n.3 (citation omitted). But it makes little sense to apply the presumption when interpreting an interstate compact that was negotiated, drafted, and executed by a group of States. Employing the presumption effectively favors one State's interpretation of the compact over the objective meaning of its terms, and in turn, will often deprive non-breaching States of bargained-for compact benefits under the guise of respecting their sovereignty. Not surprisingly, the Court long ago recognized that States may not unilaterally determine the effect of their compact obligations by force of their own laws:

> It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State.

West Virginia ex rel. Dyer, 341 U.S. at 28; *see also Hinderlider*, 304 U.S. at 106 ("Whether the apportionment of the water of an interstate stream be made by compact . . . with the consent of Congress or by a decree of this Court, the apportionment is binding

upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact."); *Kentucky v. Indiana*, 281 U.S. 163, 176-77 (1930) (States cannot determine their rights under an interstate compact "inter sese," but instead, the Court "must pass upon every question essential to such a determination, although local legislation . . . may be involved.") (citation omitted).

At bottom, the Tenth Circuit was able to salvage Oklahoma's challenged water statutes only by subverting the other Signatory States' rights under the Compact. Assuming the presumption against implied preemption survived *PLIVA*, its usage should be confined to the context of reconciling federal statutes and regulations with potentially conflicting state laws.

4. Moreover, the Tenth Circuit overlooked the fact that the Signatory States had specifically anticipated the potential for conflict between the Compact and state laws, and expressly stated in two places that the Compact must prevail in all such instances. First, Section 2.01 of the Compact states:

> Each Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state [and] may freely administer water rights and uses in accordance with the laws of that state, *but such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact.*

Pet. App. at 86 (emphasis added). Section 2.10(a) then states:

> Nothing in this Compact shall be deemed to: [i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, *not inconsistent with its obligations under this Compact.*

Pet. App. at 87 (emphasis added).

Although the Tenth Circuit cited portions of these provisions to support its conclusion that Congress and the Signatory States intended to preserve the States' ability to regulate the usage and control of water within their boundaries, *see* Pet. App. at 33, 35, the court omitted and failed to account for the overriding effect of the italicized language. The cited provisions make unmistakably clear that, although the Signatory States are generally permitted to administer water rights within their borders, they may not legislate around their commitments under the Compact. *Cf. Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869-72 (2000) (a "saving" clause preserving the operation of state law does not bar or affect the ordinary working of conflict preemption principles).

There is simply no basis for employing a presumption against implied preemption when the Signatory States explicitly provided that the Compact is intended to prevail in any potential conflict with state law. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (preemptive "purpose" is "the ultimate touchstone" in every preemption case) (citation

omitted). Instead of endeavoring to reconcile the Compact with Oklahoma law, the Tenth Circuit should have aimed to give effect to the plain meaning of the Compact's text. *See Smiley*, 517 U.S. at 744 ("What *is* at issue here is simply the meaning of a provision that does not . . . deal with pre-emption [itself], and hence does not bring into play the considerations" warranting usage of a presumption against preemption.).

B. Oklahoma's Discrimination Against Texas Water Appropriators Conflicts with Section 5.05(b)(1) of the Compact.

1. Oklahoma's challenged water permitting statutes cannot be squared with the plain command of Section 5.05(b)(1) of the Compact. That section declares that the Signatory States "shall have *equal rights to the use of* runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more," and provided that "no state is *entitled* to more than twenty-five percent (25%) of the water in excess of 3,000 cubic feet per second." Pet. App. at 88-89 (emphasis added).[19]

Unlike other subbasins established by the Compact, Subbasin 5 is *not* defined by state boundaries, and traverses parts of Oklahoma, Texas, and Arkansas. Pet. App. at 88-89; *see also* Pet. App. at 36. And crucially, unlike water allotments established for other subbasins that do traverse state lines, Section

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19. The Red River meets these minimum flow conditions over 95% of the time. CA App.435.

5.05(b)(1) does *not* limit the Signatory States' "equal rights to the use of" water within Subbasin 5 to usage from within each state's respective borders. *Compare* Pet. App. at 88-89 (Compact § 5.05(b)(1)), *with id.* at 88 (Compact § 5.03(b)) (Oklahoma and Arkansas "shall have free and unrestricted use of the water of this subbasin *within their respective states* . . . .") (emphasis added); *id.* at 90 (Compact § 6.03(b)) ("Texas and Louisiana *within their respective boundaries* shall each have the unrestricted use of the water of this subbasin . . . .") (emphasis added).

Instead, Section 5.05(b)(1) provides all four Signatory States with "equal rights to the use of runoff originating in . . . and undesignated water flowing into" any part of Subbasin 5, without reference to state lines. The differing terminology used throughout the Compact is presumptively meaningful. *See New Jersey*, 552 U.S. at 615-16; *cf. Miller v. Robertson*, 266 U.S. 243, 251 (1924) (intention of parties to an agreement should be gathered from the whole instrument); NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES & STATUTORY CONSTRUCTION § 46:6 (7th ed. 2007) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.").

2. Under its plain terms, and particularly when compared to other sections of the Compact, Section 5.05(b)(1) both provides each Signatory State with "equal rights" to use water from anywhere within Subbasin 5, and "entitle[s]" each State to use up to 25% of the water in excess of 3000 cubic feet per second.

Consequently, if Texas water appropriators wish to acquire and use Texas's share of Subbasin 5 water from within another Signatory State—either because Texas cannot feasibly obtain its share of Subbasin 5 water from within its own borders, or because it simply makes economic or environmental sense for Texas to acquire its share from without the State—Texans have the right to do so under the Compact, provided that they do not exceed Texas's 25% allotment. Indeed, Oklahomans are not permitted to use more than Oklahoma's own 25% share of Subbasin 5 water before the water crosses out of Oklahoma. Accordingly, Oklahoma has no legal basis to prevent Texas from appropriating its fair share of Subbasin 5 water from within Oklahoma.

However, by establishing a series of legal obstacles that effectively prevent out-of-state water consumers from obtaining water from within Oklahoma, *see* Pet. at 7-10, Oklahoma's challenged laws conflict with and burden Texas's rights under Section 5.05(b)(1) of the Compact. Simply put, each Signatory State is entitled to a specified amount of Subbasin 5 water under the Compact, and Oklahoma law prevents Texans from obtaining that water from within Oklahoma. While Oklahoma is entitled to regulate and administer water rights within its boundaries, it may not prevent Tarrant from obtaining Texas's rightful share of Subbasin 5 water from within Oklahoma. Pet. App. at 86-87(Compact §§ 2.01, 2.10(a)).

Although the Tenth Circuit rightly concluded that Section 5.05, as a whole, is designed to "ensure that an equitable share of water from the subbasin reaches the

states downstream from Oklahoma and Texas," Pet. App. at 36, the court overlooked the remainder of the rights established by the section in its effort to accommodate the challenged Oklahoma laws. Sections 5.05(b)(2)-(3) do require the upstream States to allow certain amounts of water to flow to Louisiana under low-flow conditions. But nothing changes the fact that the Signatory States also are entitled to enjoy their equal share of Subbasin 5 water from anywhere within the subbasin under ordinary flow conditions.

3. In sum, because Oklahoma's discriminatory water-permitting statutes cannot be reconciled with Section 5.05(b)(1) of the Compact, they must "give way" to the Compact as a matter of law. *PLIVA*, 131 S. Ct. at 2577. Given the potential for confusion over the applicability of the presumption against implied preemption in the context of an interstate-compact dispute, the machinations the Tenth Circuits' decision could invite, and the unquestionable importance of the water rights at stake, the Court should grant review.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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No. 11-889

In The
Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,

Petitioner,

v.

RUDOLF JOHN HERRMANN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICUS CURIAE UPPER TRINITY REGIONAL WATER DISTRICT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST

The Upper Trinity Regional Water District ("Upper Trinity") – like Tarrant Regional Water District, the Petitioner in the captioned case ("Tarrant") – wants to acquire water from the Oklahoma portion of the Red River Basin.[1] *See* Petition for a Writ of Certiorari filed by Tarrant on January 19, 2012 (the "Petition") at 5.

The Red River forms the border between Oklahoma and Texas. Oklahoma, Texas, Arkansas and Louisiana signed an interstate agreement apportioning water from the Red River Basin. That agreement – the Red River Compact – was approved by Congress in 1980, Pub. L. No. 96-564, 94 Stat. 3305 (1980), and has the status of federal law.

A conservation district located in North Texas, Upper Trinity was created by the State of Texas in 1989. The purpose of Upper Trinity is to provide towns, cities and utilities in its service area with a reliable long-term water supply.

This case has a direct bearing on Upper Trinity's ability to fulfill its purpose. Upper Trinity has filed applications with the Oklahoma Water Resources

---

[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties have consented to the filing of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

Board for permits to obtain water from the Kiamichi River and Boggy Creek basins and from Lake Texoma – all areas of the Red River Basin located in Oklahoma. The Board – using the same water-allocation criteria challenged in the case below – has held the Upper Trinity applications in abeyance and refused to grant permission to acquire its apportionment of water from Oklahoma.

The Water Shortage In North Texas

Upper Trinity provides water to Denton County and two other North Texas counties. Its service area is part of the Dallas-Fort Worth Metropolitan Area. In years to come, Upper Trinity's needs are expected to increase:

> The Dallas-Fort Worth Metropolitan Area's growth is putting a strain on the availability of current water supplies in North Texas. Even with state-of-the-art water recycling and a dramatic shift in the efficiency of consumer water use, this area appears headed toward insufficient water supplies in mere decades as the population's projected growth numbers continue to climb. As a result, various water districts, utilities and municipalities are engaging in a large-scale competition to grab up all available water rights within a cost-effective distance.

Nicholas Andrew, *Interstate Water Transfers and the Red River Shootout*, 41 Tex. Envtl. L.J. 181, 181 (2011) ("Andrew").

The Dallas-Fort Worth Metropolitan Area is the fourth largest in the country. The population of the Dallas-Fort Worth Metropolitan Area is projected to double by 2060. Demand for water will substantially exceed supply.

The Water Surplus In Oklahoma

The water districts of North Texas have identified Oklahoma as a practical long-term source of water. Oklahoma is located in the Mississippi River watershed and has substantial water resources. The Oklahoma Water Resources Board estimates that only 1.87 million acre-feet per year of stream water is currently used in Oklahoma. Oklahoma Water Resources Board, *Oklahoma Comprehensive Water Plan Update* at 64 (2011).

Another 34 million acre-feet of unused water flows out of Oklahoma annually, toward the Gulf of Mexico. The Oklahoma Water Resources Board has stated that "the average annual flow of the six major river basins in southeastern Oklahoma is 6,363,628 acre-feet." *Status Report to the Office of the Governor* (2002). That is enough water to supply the entire State of Oklahoma three times over.

The Oklahoma Anti-Export Law

Oklahoma regulations effectively prohibit the export of water to other states. "[T]he underlying legal framework is 'unapologetically protectionist'." Petition at 3. In 2004, the Oklahoma Legislature

"mandated a complete prohibition on the sale of water outside the state pending a comprehensive state-wide water study. . . ." Andrew, 41 Tex. Envtl. L.J. at 182 & n. 8, *citing* Okla. Stat. Ann. Tit. 82, § 1B. The Oklahoma Legislature amended the prohibition statute in 2008 – during the pendency of litigation – "specifically to forbid Oklahoma water districts from issuing out-of-state export permits without the express approval of the Oklahoma legislature." Andrew, 41 Tex. Envtl. L.J. at 182 & n. 9.[2] *See* Petition at 7-10 (describing the Oklahoma water embargo statutes). The Oklahoma statutes have been called an "anti-export law," *id.* at 202 & n. 147, and are collectively referred to herein as the "Oklahoma anti-export law."

Oklahoma claims plenary jurisdiction to regulate the waters of the State of Oklahoma, including the waters of the Red River Basin within the state-line.[3] That claim is repugnant to federal law. Section 2.07 of the Red River Compact provides:

> **Nothing in this Compact shall be deemed to impair or affect the powers, rights, or obligations of the United States, or those**

---

[2] New legislation would only permit out-of-state export permits authorized by popular vote of the people of Oklahoma, that is, by referendum.

[3] The Attorney General of the State of Oklahoma commenced an original action in the Supreme Court of Oklahoma on February 10, 2012, to establish that the State of Oklahoma has regulatory control of all waters within its boundaries (including without limitation interstate waters apportioned by the Red River Compact).

> **claiming under its authority, in, over and to water of the Red River Basin.**

(emphasis added). Section 2.07 grants the United States plenary jurisdiction over the water of the Red River Basin.[4]

SUMMARY OF ARGUMENT

The Dormant Commerce Clause

Tarrant poses two questions. *See* Petition at ii. Tarrant's first question is: Does the Oklahoma anti-export law violate the dormant Commerce Clause *because* the Red River Compact does not authorize such a state law? Or did Congress somehow authorize the State of Oklahoma to enact the Oklahoma anti-export law when it (*i.e.*, Congress) approved the Red River Compact?

Water is an article of interstate commerce. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 953-54 (1982). "Congress has the power to apportion interstate rivers. The Commerce Clause is a complete source of congressional authority to allocate an interstate river to further federal interests." A. Dan Tarlock, *Law of Water Rights and Resources* § 10:28

[4] "Water of the Red River Basin" is defined in Section 3.01(d) of the Red River Compact to include "tributaries." "Tributaries" include both "intrastate" and "interstate" tributaries of the Red River. *Id.* § 3.01(e-g).

at 10-49 & n. 1 (2010) (hereinafter, "Tarlock"). "It has long been settled that Congress has extensive authority over this Nation's waters under the Commerce Clause." *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979).

The Oklahoma anti-export law discriminates against out-of-state importers of Oklahoma water. "Discrimination" means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority*, 550 U.S. 330, 338 (2007). Because the Oklahoma anti-export law is motivated by "simple economic protectionism," it is subject to a "virtually *per se* rule of invalidity." *Id.*, *quoting Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). *See Sporhase*, 458 U.S. at 957-59; Tarlock § 10:29 at 10-53.

The United States Court of Appeals for the Tenth Circuit held that Congress, by approving the Red River Compact, authorized Oklahoma to enact the Oklahoma anti-export law without violating the dormant Commerce Clause. *See Tarrant Regional Water District v. Herrmann*, 656 F.3d 1222, 1237-39 (10th Cir. 2011).

The Tenth Circuit misreads the Red River Compact. An interstate compact is a contract, and must be read as such. The Tenth Circuit fails to give effect and meaning to all the terms of the Compact. The Tenth Circuit effectively "rewrites" the Compact by

inventing a state "plenary power" to regulate water. *See* Petition at 19-20 and 27.

One last point: Absent an interstate compact, the equitable apportionment of interstate water in the Red River Basin would be a matter of federal common law.

Supremacy Clause

Tarrant's second question is: Does the Red River Compact preempt the Oklahoma anti-export law? Petition at ii. The Compact expressly provides for the equitable apportionment of interstate water in the Red River Basin. The Oklahoma anti-export law defeats that purpose, and is preempted by federal law – the Compact.

Federal law occupies the field of interstate water regulation. There has been a federal common law of the "equitable apportionment" of interstate water for over a century. *See* Argument – Part I.B., *infra*. As a result, the Compact preempts the Oklahoma anti-export law under the doctrine of "field preemption."

In the alternative, the Compact preempts the Oklahoma anti-export law under the doctrine of "express preemption." The express language of the Compact limits state water regulation to a secondary, subordinate *intrastate* role. And, of course, Section 2.07 of the Compact makes it clear that nothing in the Compact shall be deemed to "impair or affect the

powers, rights, or obligations" of the United States "in, over, and to water of the Red River Basin."[5]

Among other things, the Tenth Circuit opinion holds that the Compact does *not* preempt the Oklahoma anti-export law because the legislative history – the "Interpretive Comments" of the drafters of the Compact – does not indicate that the drafters of the Compact intended it to preempt state law. *See Tarrant*, 685 F.3d at 1245. Significantly, the drafters of the Compact were not members of Congress.

The absence of legislative history does not indicate a Congressional intent (or lack of intent) to preempt a statute. *See* Argument – Part II.D., *infra* (discussing the Conan Doyle theory of statutory interpretation).

ARGUMENT

I. The Oklahoma Anti-Export Law Violates The Dormant Commerce Clause

The "dormant" Commerce Clause is the implied, unexercised, reserve power of Congress to regulate interstate commerce. "The *dormant commerce clause* is the principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce." Erwin Chemerinsky, *Constitutional Law:*

[5] The Tenth Circuit's *Tarrant* opinion does not acknowledge, quote or discuss Section 2.07 of the Red River Compact.

Principles and Policies § 5.3.1 at 401 (2d ed. 2002) (hereinafter, "Chemerinsky").

Congress clearly has the power to apportion water from multistate river basins. Tarlock § 10:28 at 10-49 & n. 1 ("Congress has the power to apportion interstate rivers"), *citing Arizona v. California*, 373 U.S. 546, 597-98 (1963). Congress used that power when it approved the Red River Compact. Tarlock § 10:28 at 10-49 to 10-50 & n. 6, *citing Texas v. New Mexico*, 462 U.S. 554, 564, 567-68 (1983).

According to the Tenth Circuit, Congress did not prohibit the enactment of the Oklahoma anti-export law when it approved the Red River Compact. *See Tarrant*, 656 F.3d at 1237-39. Congress can consent to a state regulation of interstate commerce that would otherwise violate the dormant Commerce Clause. "Congressional consent can transform otherwise unconstitutional state action into permissible state action." *Tarrant*, 656 F.3d at 1233-34.

The Tenth Circuit states that an interstate compact "remains a legal document that must be construed and applied in accordance with its terms." *Tarrant*, 656 F.3d at 1237, *quoting Texas v. New Mexico*, 482 U.S. 124, 128 (1987). "A compact is, after all, a contract." *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting), *quoted in* Tarlock § 10:24 at 10-38 & n. 8. "As with all contracts," compacts must be interpreted "according to the intent of the parties, here the signatory States." *Montana v. Wyoming*, ___ U.S. ___, 131 S.Ct. 1765, 1771 n. 4 (2011), *quoted in* Petition at 34.

> A contract or agreement is
>
> to be read as a whole and an interpretation that gives effect to every part of the agreement is favored over one that makes some part of it mere surplusage.

E. Allan Farnsworth, *Contracts* § 7.11 at 458 & nn. 12-13 (4th ed. 2004) (footnotes omitted) (hereinafter, "Farnsworth"). "Every word and clause must be given effect." Karl N. Llewellyn, *Remarks On The Theory Of Appellate Decision And The Rules Or Canons About How Statutes Are To Be Construed*, 3 Vand. L. Rev. 395, 401 (1950), *cited in* Antonin Scalia, *A Matter of Interpretation*, 26 n. 32 (1997) (hereinafter, "Scalia").

A. The Tenth Circuit Rewrote The Red River Compact

The Tenth Circuit analyzed the Red River Compact and determined that Congress authorized Oklahoma to enact the Oklahoma anti-export law. *Tarrant*, 656 F.3d at 1237-39. To reach that result, the Tenth Circuit had to "rewrite" the Red River Compact.

1. Section 2.01

The Tenth Circuit does not follow ordinary rules of construction: The Tenth Circuit construes Section 2.01 of the Red River Compact, but does not quote the relevant part of Section 2.01. It does not account for and give effect to all of the words in Section 2.01.

"A writing must be interpreted as a whole and no part should be ignored." Joseph M. Perillo, *Calamari And Perillo On Contracts* § 3.13 at 159 & n. 9 (5th ed. 2003) (hereinafter, "Calamari & Perillo"), *citing Tennessee Gas Pipeline v. FERC*, 17 F.3d 98, 102-03 (5th Cir. 1994); *Affiliated FM Ins. v. Owens-Corning Fiberglas Corp.*, 16 F.3d 684, 686 (6th Cir. 1994); Farnsworth § 7.11 at 458 & nn. 12-13.

Section 2.01 provides:

> Each Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state. Each state may freely administer water rights and uses in accordance with the laws of that state, **but such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact**.

(emphasis added).

The Tenth Circuit does not quote or discuss the portion of Section 2.01 that appears in bold print.[6] That language permits states to "administer water rights and uses . . . **subject to** the availability of water in accordance with the apportionments made

---

[6] To be more precise, the Tenth Circuit does not quote or discuss the bold print language from Section 2.01 in its "Consent Analysis." *See Turrant*, 656 F.3d at 1237-39. Earlier, in its review of the trial court's order, the Tenth Circuit quoted the bold print language but did not attribute meaning to the language. *Id.* at 1236.

by this Compact" (emphasis added). The state's rights to regulate water are subordinate to the federal apportionment of that water.

Significantly, the Tenth Circuit is incorrect when it suggests that Section 2.01 "recognizes **plenary state authority** over water use . . . **using unqualified terms**." *Tarrant*, 656 F.3d at 1237 (emphasis added). The words "subject to" in Section 2.01 are *qualifying terms*. The very idea of "plenary state authority" is completely inconsistent with Section 2.07 of the Red River Compact:

> Nothing in this Compact shall be deemed to impair . . . the powers . . . of the United States . . . in, over and to water of the Red River Basin.

2. Section 2.10

According to the Tenth Circuit, "Section 2.10 echoes and reinforces § 2.01's expansive acknowledgement of state discretion. . . ." *Tarrant*, 656 F.3d at 1237. It would be more correct to say that Section 2.10 "echoes and reinforces" the *restrictions* and *qualifications* on state discretion set forth in Section 2.01.

The Tenth Circuit does not quote the relevant parts of Section 2.10, and does not give effect to all the words therein. *See* Calamari & Perillo § 3.13 at 159 & n. 9; Farnsworth § 7.11 at 458 & nn. 12-13. Section 2.10 provides in pertinent part:

> Nothing in this Compact shall be deemed to:
>
> (a) Interfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, **not inconsistent with its obligations under this Compact**;
>
> (b) Repeal or prevent the enactment of any legislation or the enforcement of any requirement by any Signatory State imposing any additional conditions or restrictions to further lessen or prevent the pollution or natural deterioration of water within its jurisdiction; **provided nothing contained in this paragraph shall alter any provisions of this Compact dealing with the apportionment of water or the rights thereto**. . . .

(emphasis added).

The Tenth Circuit does not quote or discuss the portion of Section 2.10 that appears in bold print.[7] That language permits state regulations "not inconsistent with" the state's obligations under the Red River Compact. The state's rights to regulate water are subordinate to the federal apportionment of that

---

[7] *See Tarrant*, 656 F.3d at 1237-39 ("Consent Analysis"). Later, in its discussion of the Supremacy Clause issue, the Tenth Circuit quoted the bold print language from Section 2.10 but did not attribute meaning to the language. *Id.* at 1242-43 and 1246.

water. *See* Red River Compact § 2.07 ("Nothing in this Compact shall be deemed to impair . . . the powers . . . of the United States. . . .").

3. Section 1.01

The Tenth Circuit states that

> [t]he Compact states its purpose to govern the "use, control and distribution" of the compacted water. *See id.* § 1.01(a). . . . Section 1.01(a) . . . manifests the wide scope of state authority. The word "control" is unqualified and, along with the words "use" and "distribution" and the Compact sections that follow, indicates that each Signatory State is authorized to regulate the appropriation and transport of apportioned water and that such authorized regulation is not limited to particular purposes.

Tarrant, 656 F.3d at 1238-39.

Contracts should be interpreted in light of their purpose:

> The goal of interpretation is to determine the common intention of the parties – if they had one. . . . The principal purpose of the parties is of particular importance in determining meaning.

Calamari & Perillo § 3.13 at 158 & nn. 2, 4. "[I]f the principal purpose of the parties is ascertainable it is given great weight." Restatement (Second) of Contracts § 202(1) (1981) (hereinafter, the "Restatement"),

quoted in Farnsworth § 7.10 at 454 & n. 16. "Such purpose interpretation has a secure place in the field of statutory interpretation, where it stems from *Heydon's Case*."[5] Farnsworth at 454-55 & n. 17.

Unfortunately, the Tenth Circuit does not correctly identify the purpose of the Red River Compact. The Tenth Circuit does not quote the relevant part of Section 1.01, and does not give effect to all the words therein. Section 1.01 provides in pertinent part:

> The **principal purposes** of this Compact are:
>
> (a) **To promote interstate comity and remove causes of controversy between each of the affected states by governing** the use, control and distribution **of the interstate water of the Red River and its tributaries;**
>
> (b) **To provide an equitable apportionment among the Signatory States of the water of the Red River and its tributaries;** . . .
>
> (e) **To provide a basis for state or joint state planning and action by ascertaining and identifying each state's share in the interstate water of the Red River Basin and the apportionment thereof.**

(emphasis added).

---

[5] 76 Eng. Rep. 637 (Ex. 1584) (Coke, J.) (first case to use the "mischief rule").

The Tenth Circuit does not quote or discuss Sections 1.01(b) or 1.01(e) of the Red River Compact. Those sections spell out the purpose of the Compact is "[t]o provide an *equitable apportionment* among the Signatory States of the water of the Red River and its tributaries" and to allow for planning and action by ascertaining and identifying "*each state's share in the interstate water of the Red River Basin and the apportionment thereof*" (emphasis added). The purpose of the Red River Compact is to impose *federal* regulation and control upon the water in the Red River Basin.

Federal "equitable apportionment" of interstate water is the real purpose of the Red River Compact. *See* Red River Compact – Preamble and §§ 1.01(b) and 2.07.[9]

---

[9] When the intent and meaning of a contract can be determined from the four corners of the contract, it is not appropriate to rely upon intrinsic evidence to determine intent and meaning. *See* Farnsworth § 7.12 at 464 & n. 13 ("four corners" rule); Calamari & Perillo § 3.10 at 151 & nn. 1-2 ("Plain Meaning Rule"); Restatement §§ 200-204. As a consequence, the Tenth Circuit's reliance upon "Interpretive Comments" (*i.e.*, legislative history) was inappropriate. *See* Argument – Part II.D., *infra* (questioning the Tenth Circuit's reliance upon legislative history).

The Tenth Circuit also fails to consider Sections 2.08, 2.09 and 2.11 of the Red River Compact. Those provisions all are inconsistent with the Tenth Circuit theory that Oklahoma retains plenary power to regulate Red River Basin water.

B. Interstate Compacts Are The Preferred Method Of Allocating Interstate Waters

In the absence of an interstate compact, this Court would have the responsibility for equitably apportioning the water in the Red River Basin. *See* Tarlock §§ 10:3 and 10:4. Under the doctrine of equitable apportionment, "[e]ach state has an equal right to use the flow of an interstate stream. *Id.* § 10:4 at 10-4 & n. 2-1. *See Kansas v. Colorado*, 206 U.S. 46 (1907); *Virginia v. Maryland*, 540 U.S. 56 (2003) (cited and discussed in Tarlock).

"Interstate compacts are said to be the preferred method of allocating interstate waters." Tarlock § 10:24 at 10-36 & n. 1, *citing*, *inter alia*, Charles J. Meyers, *The Colorado River*, 19 Stan. L. Rev. 1, 48-50 (1966). Interstate water compacts exist to protect states from discrimination and overreaching by other states:

> Interstate compacts are negotiated to guarantee individual states a share of unallocated water by protecting the state against another state putting the water to use first and acquiring an "equity" under the law of equitable apportionment.

Tarlock § 10:35 at 10-61.

Significantly, the Court has exercised the power of equitable apportionment of interstate streams since 1907. Tarlock § 10:4 at 10-3 & n. 1, *citing Kansas v. Colorado*, 206 U.S. 46 (1907). A leading treatise summarizes the Court's holding as follows:

> Kansas sued Colorado to enjoin Colorado's upstream diversions along the Arkansas River and argued that Colorado could not use the river under the natural flow theory of riparian rights; Colorado responded that territorial sovereignty gave it the right to deplete the entire flow of the stream. Kansas' complaint was dismissed without prejudice, but the Court announced a sharing rule for future cases. **Each state has an equal right to use the flow of an interstate stream.**

Tarlock at 10-3 to 10-4 & nn. 2-2.1 (footnotes omitted; emphasis added).

The rule announced in *Kansas v. Colorado* – the "equal share" rule – is the general rule adopted in the Compact. *See* Red River Compact – Preamble and § 5.05(b)(1).

The Court's power of equitable apportionment is a federal common law power. The Court explained that power in *Colorado v. New Mexico*, 459 U.S. 176 (1982):

> Equitable apportionment is the doctrine of federal common law that governs disputes between States concerning their rights to use the water of an interstate stream. . . .
>
> The laws of the contending States concerning intrastate water disputes are an important consideration governing equitable apportionment. . . . **But state law is not controlling.** Rather, the just apportionment of interstate waters is a question of federal law

> that depends "upon a consideration of the pertinent laws of the contending States and *all other relevant facts.*" *Connecticut v. Massachusetts*, 282 U.S., at 670-71, 51 S.Ct., at 289 (emphasis added).

459 U.S. at 183-84 (bold emphasis added).

II. The Oklahoma Anti-Export Law Violates The Supremacy Clause

"It is perfectly evident that the purpose of the [Supremacy Clause] is to make federal authority supreme over state." Alexander M. Bickel, *The Least Dangerous Branch* 9 (1962). When federal laws conflict with state laws, federal laws preempt state laws. *See* Chemerinsky at 4.

The Red River Compact was approved by Congress, and is federal law for the purposes of the Supremacy Clause. As shown in Part I., *supra*, the Red River Compact expressly permits state regulation that does not conflict with the Compact's federal water apportionment regime. As a consequence, the Red River Compact expressly preempts state law that does so conflict. As a general rule, the United States has plenary authority to regulate the waters of the Red River Basin. *See* Red River Compact § 2.07. Because the Oklahoma anti-export law clearly conflicts with the federal Compact, *e.g.*, Petition at 9 & n. 3, 14 & n. 5, 26 & n. 13, the Red River Compact preempts the Oklahoma anti-export law.

A. Interstate Water Apportionment Is Not An Area Of Longstanding State Regulation

The Tenth Circuit asserts that preemption is "disfavored in this area of longstanding state regulation of water." *Tarrant*, 656 F.3d at 1245. In actuality, the equitable apportionment of interstate water is a matter entrusted to the federal courts. It is well-settled that "there is no federal general common law." *Erie Railroad v. Tomkins*, 304 U.S. 64, 78 (1938). There is, however, a specialized federal common law of equitable apportionment of interstate waters. *See* Argument – Part I.B., *supra*. That body of federal common law has existed for over 100 years. *Id.* "[S]tate law is not controlling." *Colorado v. New Mexico*, 459 U.S. at 184 (quoted in Argument – Part I.B., *supra*).

1. Field Preemption

In its *Tarrant* opinion, the Tenth Circuit recognizes three types of federal preemption:

(a) express preemption;

(b) implied field preemption; and

(c) implied conflict preemption.

656 F.3d at 1241. *See* Chemerinsky § 5.2.1 at 376-78, *quoting Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (to the same effect).

The Tenth Circuit characterizes the instant case as a potential "implied conflict preemption" case, but

concludes that there is no conflict and, accordingly, no preemption. *Tarrant*, 656 F.3d at 1241-45.

As explained above, federal regulation of interstate waters has been pervasive and longstanding. Because the federal government has "take[n] unto itself all regulatory authority" in the field of interstate water apportionment, this would seem to be a *field preemption* case, rather than a *conflict preemption* case. *Tarrant*, 656 F.3d at 1241, *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See* Chemerinsky § 5.2.3 at 384-91.

The Tenth Circuit recognizes a presumption that federal law will *not* preempt state law under the Supremacy Clause – a presumption against preemption. *See Tarrant*, 656 F.3d at 1242. The presumption applies in "implied conflict preemption" cases. *Id.* If Upper Trinity is correct, and this is a "field preemption" case, there is no presumption against preemption. *See Wyeth v. Levine*, 555 U.S. 555, 565-67 & n. 3 (2009); *Tarrant*, 656 F.3d at 1242.[10]

---

[10] There was no discussion of the presumption against preemption in the recent case of *PLIVA, Inc. v. Mensing*, ___ U.S. ___, 131 S.Ct. 2567 (2011). *Mensing* was an "impossibility" case. *Id.* at 2577. This case is also an "impossibility" case. The Oklahoma water embargo makes it impossible to apportion water in the manner contemplated and required by the Red River Compact. *See* Petition at 9 n. 3 ("Despite the [Red River] Compact's apportionment to Texas of an equal share of the water in reach II, subbasin 5, Oklahoma argues that all water located in the State belongs to Oklahoma for its exclusive in-state use")

(Continued on following page)

2. *California v. United States*

The Tenth Circuit asserts that water law is a "matter [] of longstanding state regulation" and quotes an excerpt from *California v. United States*, 438 U.S. 645 (1978), regarding

> the consistent thread of purposeful and continued deference to state water law by Congress.

438 U.S. at 653, *quoted in Tarrant*, 656 F.3d at 1242.

California v. United States was a reclamation case, not an equitable apportionment case. No interstate waters were involved. Applying the Reclamation Act of 1902, the Court ultimately held that a state may impose any condition on control, appropriation use or distribution of water in a federal reclamation project which is not inconsistent with clear congressional directives respecting the project. *Id.* at 679. *California v. United States* is inapposite.

B. The Provisions Of The Red River Compact Do Not Call For "Pronounced Deference" To State Water Laws

The Tenth Circuit erroneously asserts that the provisions of the Red River Compact "generally call for pronounced deference to, not displacement of, state water laws." *Tarrant*, 656 F.3d at 1245. As shown in

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and 33-34 ("The presumption against preemption does not apply to interstate compacts.").

Part I.A. of the Argument, *supra*, the Red River Compact expressly provides that state regulatory power is conditioned upon, subject to and subordinate to federal law (*i.e.*, the Compact). *See* Red River Compact §§ 1.01, 2.01, 2.07 & 2.10.

The express language of the Red River Compact describes the potential for an inconsistency or conflict, and expressly imposes a rule of priority and preference for federal law. This case is an *express preemption* case, rather than an *implied conflict* case. *See* Chemerinsky § 5.2.2 at 380-81, *citing Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (Federal Meat Inspection Act preempted state law). There is no presumption against preemption in an express preemption case. *Wyeth*, 555 U.S. at 565-66 & n. 3; *Tarrant*, 656 F.3d at 1242.

C. The Tenth Circuit Misreads Section 5.05(b)(1) Of The Red River Compact

The Tenth Circuit asserts that Section 5.05(b)(1) of the Compact "can reasonably be read to foreclose Tarrant's interpretation [*i.e.*, Tarrant's interpretation of the Compact as preempting Oklahoma's anti-export law]." With respect, that is not a very ambitious claim. It implies that Section 5.05 can also reasonably be read to *support* Tarrant's interpretation.

Section 5.05(b)(1) adopts the conventional federal common law rule of equitable apportionment – "equal rights." *See* Argument – Part I.B., *supra*; Tarlock

§ 10:4 at 10-4 & n. 2-1 ("Each state has an equal right to use the flow of an interstate stream."). That rule is consistent with Tarrant's Supremacy Clause argument: The Oklahoma anti-export law is inconsistent with the equal apportionment rule of Section 5.05(b)(1) of the Compact and is preempted.

The Tenth Circuit admits that Section 5.05(b)(1) can be read in the manner proposed by Tarrant – that the phrase "Signatory States shall have equal rights to the use of . . . " can mean "share and share alike." *Tarrant*, 656 F.3d at 1246.

> It may be possible to identify a different interpretation of this phrase [*i.e.*, "equal rights to the use of"] so that it conflicts with the Oklahoma state water laws, but simply finding a possible alternative take [sic] on the meaning of federal law does not establish preemption.

Id.

Under the Tarrant-Upper Trinity theory, the word "equal rights" means "equal rights." *See* Petition at 28-32. Under the Tenth Circuit's theory, the word "equal rights" means "the same opportunity and entitlement to use up to 25 percent of the excess water *in its state* and *under its state laws*." 656 F.3d at 1246 (emphasis added). With respect, the Tenth Circuit's theory misreads the Compact.

The part of the Red River Basin that is apportioned by Section 5.05(b)(1) – reach II, subbasin 5 – is a multi-state area. If the Signatory States had

intended to apportion on the basis of state lines, they could have done that. They apportioned *other areas* within the Compact on the basis of state lines. *See* Petition at 32, *citing* Sections 5.03(b) and 6.03(b) of the Compact. *See also* Section 4.02(b) of the Compact (allocating "free and unrestricted use of the water in reach I, subbasin 2 to Oklahoma) (described in Petition at 6). The Tenth Circuit's theory reforms and "rewrites" the Compact.[11]

D. The Tenth Circuit Should Not Have Considered The "Interpretive Comments" To The Red River Compact

The Tenth Circuit used the "Interpretive Comments" of the drafters of the Red River Compact to interpret the Compact. *Tarrant*, 656 F.3d at 1238. The Tenth Circuit explained the "Interpretive Comments" as follows:

> To aid in the understanding of the Compact, the Compact's Negotiating Committee wrote Interpretive Comments so that future readers "might be apprised of the intent of the Compact Negotiating Committee with regard to each Article of the Compact.

656 F.3d at 1228.

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[11] The United States regulates the Red River Basin, including interstate tributaries and intrastate tributaries. *See* note 6, *supra*.

There is no evidence that the "Interpretive Comments" – written, as they were, by the *drafters* of the Red River Compact – represent the view of the members of Congress who approved that Compact. The Interpretive Comments are irrelevant: They shed no light on the question whether Congress intended the actual text of the Red River Compact to preempt (or not to preempt) state law.

To be sure, Interpretive Comments are a form of legislative history. Similar to Congressional committee reports and to the statements of witnesses at Congressional hearings, they are the comments of interested bystanders. They are not as probative as remarks made by Senators and Representatives during floor debate.

Even floor debate would be of limited probative value. Justice Jackson observed:

> I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that **weird endeavor**. That process seems to me not interpretation of a statute but creation of a statute.

United States v. Public Utils. Comm'n of Cal., 345 U.S. 295, 319 (1953) (emphasis added) (Jackson, J., concurring), *quoted in* Scalia at 30-31 & n. 42.

The Tenth Circuit says "nothing in the Interpretive Comments to the Compact supports Tarrant's interpretation [*i.e.*, Tarrant's argument that the Oklahoma anti-export law violates the Supremacy Clause]. *Tarrant*, 685 F.3d at 1245.

The silence of the legislative history may be likened to the "curious incident" of the dog that did not bark in the classic Sherlock Holmes story, "Silver Blaze." *Chisom v. Roemer*, 501 U.S. 380, 396 n. 23 (1991). *See Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting).

The Court has "forcefully and explicitly rejected the Conan Doyle approach to statutory construction in the past." *Chisom*, 501 U.S. at 406 (Scalia, J., dissenting), *citing Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.").

The Tenth Circuit should have applied "the statute [*i.e.*, the approved text of the Red River Compact], not legislative history, and certainly not *the absence of legislative history*." *Chisom*, 501 U.S. at 406 (Scalia, J., dissenting) (emphasis added). "Statutes are the law though sleeping dogs lie." *Id.*, *citing Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495-96, n. 13 (1985);

Williams v. United States, 458 U.S. 279, 294-95 (1982) (Marshall, J., dissenting).

The Tenth Circuit's reliance upon the absence of "legislative history" regarding the preemption issue is a particularly "weird endeavor." The drafters are not members of Congress. They have no "say" in whether or not the Compact will preempt state legislation. The silence of the drafter is not a "curious incident." The "absence of legislative history" is not a legitimate reason for a federal court to set aside and ignore an interstate compact.

CONCLUSION

Upper Trinity respectfully submits that the Petition for a Writ of Certiorari filed by Tarrant should be granted.

Respectfully submitted,

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FEBRUARY 2012

JOINT APPENDIX

RECORDS
AND
BRIEFS

Supreme Court, U.S.
FILED
FEB 19 2013
OFFICE OF THE CLERK

No. 11-889

In the Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,

Petitioner,

v.

RUDOLF JOHN HERRMANN ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT APPENDIX
VOLUME I

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Petition For Certiorari Filed January 19, 2012
Certiorari Granted January 4, 2013

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 07-45-HE

Tarrant Regional Water District, Plaintiff,

v.

Rudolf John Herrmann, Jess Mark Nichols, Ford Drummond, Lonnie Farmer, Ed Fite, Jack W. Keely, Kenneth K. Knowles, and Richard Sevenoaks, in their official capacities as members of the Oklahoma Water Resources Board and the Oklahoma Water Conservation Storage Commission, Linda Lambert, in her official capacity, and Joseph E. Taron, in his official capacity as a member of the Oklahoma Water Resources Board and the Oklahoma Water Conservation Storage Commission, Defendants.

RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
1	01/11/2007	Complaint
4	01/11/2007	Motion for Preliminary Injunction and Motion for Temporary Restraining Order
6	01/11/2007	Brief in Support of Motion for Preliminary Injunction and Motion for Temporary Restraining Order

NO.	DATE	DESCRIPTION
8	01/11/2009	Appendix to Brief in Support of Motion for Preliminary Injunction and Motion for Temporary Restraining Order
12	01/19/2007	Joint Motion for Order Approving Stipulation
15	01/22/2007	Order Approving Stipulation and Striking Motions for Preliminary Injunction and Temporary Restraining Order As Moot.
33	03/20/2007	Motion to Dismiss By All Defendants
34	03/20/2007	Brief in Support of Motion to Dismiss By All Defendants
39	04/30/2007	Plaintiff's Response to Motion to Dismiss
42	05/14/2007	Defendants' Response in Support of Motion to Dismiss
49	10/29/2007	Order Denying Motion to Dismiss
52	11/19/2007	Defendants' Notice of Appeal Persuant to 28 U.S.C. § 1292(a) re Eleventh Amendment Immunity & Abstention
63	10/27/2008	Opinion of Tenth Circuit Affirming Denial of Motion to Dismiss
64	10/27/2008	Judgment of Tenth Circuit
65	11/18/2008	Mandate of Tenth Circuit

NO.	DATE	DESCRIPTION
67	11/21/2008	Defendants' Answer to Complaint
72	02/19/2009	Plaintiff's Rule 26 Disclosure Statement
80	6/5/2009	Plaintiff's Supplemental Complaint
90	07/10/2009	Defendants' Motion to Dismiss or, in the Alternative, Motion For Summary Judgment
95	08/11/2009	Plaintiffs' Response to Motion to Dismiss, or, in the Alternative, Motion For Summary Judgment
96	08/11/2009	Exhibits to Plaintiffs' Response to Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment
101	08/27/2009	Defendants' Response in Support of Motion to Dismiss, or in the Alternative, Motion for Summary Judgment
124	11/10/2009	Defendants' Motion to Supplement the Record on Defendants' Motion to Dismiss
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NO.	DATE	DESCRIPTION
128	11/16/2009	Pretrial Report
134	11/18/2009	Order Granting in Part and Denying in Part Motion to Dismiss and Denying Motion to Supplement the Record
135	12/18/2009	Amended Complaint
142	01/12/2010	Motion to Dismiss Amended Complaint
158	02/17/2010	Motion for Leave to File Amicus Curiae Brief in Support of Plaintiff By State of Texas
160	02/19/2010	Plaintiffs' Response to Motion to Dismiss Amended Complaint
161	2/19/2010	Plaintiff's Motion for Leave to Supplement Amended Complaint
166	03/05/2010	Defendants' Response in Support of Motion to Dismiss Amended Complaint
167	03/12/2010	Order Granting Leave For State of Texas to File Amicus Brief
181	07/16/2010	Order Granting Motion for Leave to Supplement Amended Complaint and Motion to Dismiss Amended Complaint
182	07/16/2010	Judgment
183	08/12/2010	Notice of Appeal

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 10-6184

Tarrant Regional Water District, Plaintiff-Appellant,

v.

Rudolf John Herrmann, Jess Mark Nichols, Ford Drummond, Ed Fite, Jack W. Keely, Kenneth K. Knowles, and Richard Sevenoaks, in their official capacities as members of the Oklahoma Water Resources Board and the Oklahoma Water Conservation Storage Commission, Linda Lambert, in her official capacity, and Joseph E. Taron, in his official capacity as a member of the Oklahoma Water Resources Board and the Oklahoma Water Conservation Storage Commission, Defendants-Appellees

RELEVANT DOCKET ENTRIES

DATE	DESCRIPTION
10/05/2010	Plaintiff-Appellant Tarrant Regional Water District's brief
10/12/2010	Amicus Curiae State of Texas's brief in support of Plaintiff-Appellant Tarrant Regional Water District
11/08/2010	Defendants-Appellees' brief
11/24/2010	Plaintiff-Appellant's reply brief

DATE	DESCRIPTION
3/18/2011	Supplemental Authority filed by Plaintiff-Appellant
06/15/2011	Order for supplemental briefing on Tarrant Regional Water District's standing to raise preemption claim
06/29/2011	Defendants-Appellees' supplemental brief
06/29/2011	Plaintiff-Appellant's supplemental brief
07/07/2011	Defendants-Appellees' response to Plaintiff-Appellant's supplemental brief
07/07/2011	Plaintiff-Appellant's response to Defendants-Appellees' supplemental brief
09/07/2011	Opinion filed
09/07/2011	Judgment filed
09/21/2011	Plaintiff-Appellant Tarrant Regional Water District's petition for rehearing en banc
09/26/2011	Order for response to petition for rehearing en banc
10/11/2011	Defendants-Appellees' response to petition for rehearing en banc
10/21/2011	Order denying petition for rehearing en banc
10/31/2011	Mandate issued

RED RIVER COMPACT
WITH
SUPPLEMENTAL INTERPRETIVE
COMMENTS OF LEGAL
ADVISORY COMMITTEE

SEPTEMBER 1979
RED RIVER COMPACT COMMISSION
ARKANSAS-LOUISIANA-OKLAHOMA-TEXAS

PREAMBLE

Compact

The States of Arkansas, Louisiana, Oklahoma, and Texas, pursuant to the acts of their respective Governors or legislatures, or both, being moved by considerations of interstate comity, have resolved to compact with respect to the water of the Red River and its tributaries. By Act of Congress, Public Law No. 346 (84th Congress, First Session), the consent of the United States has been granted for said states to negotiate and enter into a compact providing for an equitable apportionment of such water; and pursuant to that Act the President has designated the representative of the United States.

Further, the consent of Congress has been given for two or more states to negotiate and enter into agreements relating to water pollution control by the provisions of the Federal Water Pollution Control Act (P. L. 92-500, 33 U.S.C. §§ 1251 et seq.).

The Signatory States acting through their duly authorized Compact Commissioners, after several years of negotiations, have agreed to an equitable apportionment of the water of the Red River and its tributaries and do hereby submit and recommend that this compact be adopted by the respective legislatures and approved by Congress as hereinafter set forth:

Comment

On the 12th of May, 1978, the authorized representatives of the States of Arkansas, Louisiana, Oklahoma and Texas approved the language of a Compact equitably apportioning the water of the Red River Basin between the States of Arkansas, Louisiana, Oklahoma and Texas.

The United States Supreme Court has long recognized that an interstate compact is the preferable means of settling disputes between states, Washington v. Oregon, 214 U.S. 205 (1909), and that an equitable apportionment of water between states is the desired resolution of interstate water disputes, Kansas v. Colorado, 206 U.S. 46 (1907). By making an equitable apportionment of the water by compact, the states hope to avoid unnecessary, lengthy and expensive litigation, and to achieve the purposes of the Compact.

Although the Red River originates in New Mexico, such a small portion of the Red River watershed is located in that state (approximately 5% of the watershed, or 450 square miles) that New Mexico elected not to participate in the Compact. For this reason, New Mexico was not named in the consent legislation.

The Compact is the result of negotiations between the states over an extended period of more than twenty years. The compact commissioners had the cooperation and advice of all interested Federal agencies, including counsel from the United States Department of Justice. The compact commissioners' activities were supported by the water resources agencies of each of the states as well as the Lower Mississippi Valley Division of the Corps of Engineers, Department of the Army.

These interpretive comments have been prepared so that members of the respective legislatures, congressional committees, Federal agencies, and subsequent compact administrators might be apprised of the intent of the Compact Negotiating Committee with regard to each Article of the Compact. By these comments, there is no attempt to cover every possibility arising under the terms of the Compact.

ARTICLE I

PURPOSES

Compact

Section 1.01. The principal purposes of this compact are:

(a) To promote interstate comity and remove causes of controversy between each of the affected states governing the use, control and distribution of the interstate water of the Red River and its tributaries;

(b) To provide an equitable apportionment among the Signatory States of the water of the Red River and its tributaries;

(c) To promote an active program for the control and alleviation of natural deterioration and pollution

of the water of the Red River Basin and to provide for enforcement of the laws related thereto;

(d) To provide the means for an active program for the conservation of water, protection of lives and property from floods, improvement of water quality, development of navigation and regulation of flows in the Red River Basin; and

(e) To provide a basis for state or joint state planning and action by ascertaining and identifying each state's share in the interstate water of the Red River Basin and the apportionment thereof.

Comment

The states by this compact are committing themselves to cooperate to achieve the purposes and goals stated in Article I.

ARTICLE II

GENERAL PROVISIONS

Compact

Section 2.01. Each Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state. Each state may freely administer water rights and uses in accordance with the laws of that state, but such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact.

Section 2.02. The use of water by the United States in connection with any individual Federal project shall be in accordance with the Act of Congress authorizing the project and the water shall be charged to the state or states receiving the benefit therefrom.

Section 2.03. Any Signatory State using the channel of Red River or its tributaries to convey stored water shall be subject to an appropriate reduction in the amount which may be withdrawn at the point of removal to account for transmission losses.

Section 2.04. The failure of any state to use any portion of the water allocated to it shall not constitute relinquishment or forfeiture of the right to such use.

Section 2.05. Each Signatory State shall have the right to:

(a) Construct conservation storage capacity for the impoundment of water allocated by this Compact;

(b) Replace within the same area any storage capacity recognized or authorized by this Compact made unusable by any cause, including losses due to sediment storage;

(c) Construct reservoir storage capacity for the purposes of flood and sediment control as well as storage of water which is either imported or is to be exported if such storage does not adversely affect the delivery of water apportioned to any other Signatory State; and

(d) Use the bed and banks of the Red River and its tributaries to convey stored water, imported or exported water, and water apportioned according to this Compact.

Section 2.06. Signatory States may cooperate to obtain construction of facilities of joint benefits to such states.

Section 2.07. Nothing in this Compact shall be deemed to impair or affect the powers, rights, or obligations of the United States, or those claiming under its authority, in, over and to water of the Red River Basin.

Section 2.08. Nothing in this Compact shall be construed to include within the water apportioned by this Compact any water consumed in each state by livestock or for domestic purposes; provided, however, the storage of such water is in accordance with the laws of the respective states but any such impoundment shall not exceed 200 acre-feet, or such smaller quantity as may be provided for by the laws of each state.

Section 2.09. In the event any state shall import water into the Red River Basin from any other river basin, the Signatory State making the importation shall have the use of such imported water.

Section 2.10. Nothing in this Compact shall be deemed to:

(a) Interfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, not inconsistent with its obligations under this Compact;

(b) Repeal or prevent the enactment of any legislation or the enforcement of any requirement by any Signatory State imposing any additional conditions or restrictions to further lessen or prevent the pollution or natural deterioration of water within its jurisdiction; provided nothing contained in this paragraph shall alter any provision of this Compact dealing with the apportionment of water or the rights thereto; or

(c) Waive any state's immunity under the Eleventh Amendment of the Constitution of the United States, or as constituting the consent of any state to be sued by its own citizens.

Section 2.11. Accounting for apportionment purposes on interstate streams shall not be mandatory under the terms of the Compact until one or more affected states deem the accounting necessary.

Section 2.12. For the purposes of apportionment of the water among the Signatory States, the Red River is hereby divided into the following major subdivisions:

(a) Reach I - the Red River and tributaries from the New Mexico-Texas state boundary to Denison Dam;

(b) Reach II - the Red River from Denison Dam to the point where it crosses the Arkansas-Louisiana state boundary and all tributaries which contribute to the flow of the River within this reach;

(c) Reach III - the tributaries west of the Red River which cross the Texas-Louisiana state boundary, the Arkansas-Louisiana state boundary, and those which cross both the Texas-Arkansas state boundary and the Arkansas-Louisiana state boundary.

(d) Reach IV - the tributaries east of the Red River in Arkansas which cross the Arkansas-Louisiana state boundary; and

(e) Reach V that portion of the Red River and tributaries in Louisiana not included in Reach III or in Reach IV.

Section 2.13. If any part or application of this Compact shall be declared invalid by a court of com-

petent jurisdiction, all other severable provisions and applications of this Compact shall remain in full force and effect.

Section 2.14. Subject to the availability of water in accordance with this Compact, nothing in this Compact shall be held or construed to alter, impair, or increase, validate, or prejudice any existing water right or right of water use that is legally recognized on the effective date of this Compact by either statutes or courts of the Signature State within which it is located.

Comment

Although this compact will be state law in each of the four Signatory States, it is not intended to interfere with any state's internal administration of water and/or water rights. Subject to the general constraints of water availability and the apportionment of the Compact, each state is free to continue its existing internal water administration, or to modify it in any manner it deems appropriate. Even during periods of water shortage when the Compact may require an upstream state to take affirmative steps to assure water deliveries, no attempt is made to specify the steps that will be taken; it is left to the state's internal water administration. Sections 2.01, 2.05, 2.10 and 2.14 each, at least in part, are intended to insure that the states' internal autonomy is not displaced by the Compact.

Section 3.07 likewise insures that federal rights and obligations are unaffected by the Compact. Pursuant to Section 2.02, use of water from federal projects in the Red River Basin will be in accordance with the congressional authorizing legislation and charged against the allotment of the state receiving the benefits of water from such federal projects.

Sections 2.03, 2.05, and 2.09 recognize the states' agreement that the Red River and its tributaries may be used for the importation or exportation of water, either on an interstate or intrastate basis. Although the Compact itself contains no importation or exportation agreement, it constitutes a general authorization for use of the Red River system if such an agreement is consumated. The Compact further establishes general ground rules of accounting for imported or exported water in connection with the apportionment of Red River water. The transmission losses mentioned in Section 2.03 are to be determined by the Compact Commission when the need for accounting arises.

Two remaining sections of the General Provisions merit special attention. Section 2.08 constitutes a total exemption of water used for livestock and domestic purposes from the Compact's apportionment. Both Texas and Oklahoma exempt these uses totally from their state water administration and thus water taken for such uses was excluded. Therefore, in calculating deliveries in the various Reaches, water taken for these purposes is not included within the total amount of water divided among the signatory states. The 200 acre-foot limitation applies to the maximum reservoir size that can be allowed for these purposes without forfeiting the exemption. The use for domestic or livestock purposes does not extend, for example, to commercial feedlot operations, or rural or urban water distribution systems. In determining whether or not a particular use qualifies as "livestock or domestic" reference shall be made to the laws of the state in which such use is occurring.

Section 2.11's importance should not be overlooked. It states that accounting of deliveries of water apportioned under the Compact is necessary only

upon the demand of an affected state. Due to the extensive gaging and record keeping required, accounting will cause a significant financial burden on the involved states. For this reason it is not envisioned that it will be undertaken as a routine matter.

Those sections of Article II not mentioned above are considered self-explanatory.

ARTICLE III

DEFINITIONS

Compact

Section 3.01. In this Compact:

(a) The States of Arkansas, Louisiana, Oklahoma, and Texas are referred to as "Arkansas," "Louisiana," "Oklahoma," and "Texas," respectively, or individually as "State" or "Signatory State" or collectively as "States" or "Signatory States."

(b) The term "Red River" means the stream below the crossing of the Texas-Oklahoma state boundary at longitude 100 degrees west.

(c) The term "Red River Basin" means all of the natural drainage area of the Red River and its tributaries east of the New Mexico-Texas state boundary and above its junction with Atchafalaya and Old Rivers.

(d) The term "water of the Red River Basin" means the water originating in any part of the Red River Basin and flowing to or in the Red River or any of its tributaries.

(e) The term "tributary" means any stream which contributes to the flow of the Red River.

(f) The term "interstate tributary" means a tributary of the Red River, the drainage area of which includes portions of two or more Signatory States.

(g) The term "intrastate tributary" means a tributary of the Red River, the drainage area of which is entirely within a single Signatory State.

(h) The term "Commission" means the agency created by Article IX of this Compact for the administration thereof.

(i) The term "pollution" means the alteration of the physical, chemical, or biological characteristics of water by the acts or instrumentalities of man which create or are likely to result in a material and adverse effect upon human beings, domestic or wild animals, fish and other aquatic life, or adversely affect any other lawful use of such water; provided, that for the purposes of this Compact, "pollution" shall not mean or include "natural deterioration."

(j) The term "natural deterioration" means the material reduction in the quality of water resulting from the leaching of solubles from the soils and rocks through or over which the water flows naturally.

(k) The term "designated water" means water released from storage, paid for by non-Federal interests, for delivery to a specific point of use or diversion.

(l) The term "undesignated water" means all water released from storage other than "designated water."

(m) The term "conservation storage capacity" means that portion of the active capacity of reservoirs available for the storage of water for subsequent beneficial use, and it excludes any portion of

the capacity of reservoirs allocated solely to flood control and sediment control, or either of them.

(n) The term "runoff" means both the portion of precipitation which runs off the surface of a drainage area and that portion of the precipitation that enters the streams after passing through the portions of the earth.

Comment

Article III is self-explanatory.

ARTICLE IV

APPORTIONMENT OF WATER REACH I

OKLAHOMA – TEXAS

Subdivision of Reach I and apportionment of water therein.

Reach I of the Red River is divided into topographical subbasins, with the water therein allocated as follows:

Section 4.01. Subbasin 1 - Interstate streams - Texas.

(a) This includes the Texas portion of Buck Creek, Sand (Lebos) Creek, Salt Fork Red River, Elm Creek, North Fork Red River, Sweetwater Creek, and Washita River, together with all their tributaries in Texas which lie west of the 100th Meridian.

(b) The annual flow within this subbasin is hereby apportioned sixty (60) percent to Texas and forty (40) percent to Oklahoma.

Section 4.02. Subbasin 2 - Intrastate and Interstate streams - Oklahoma.

(a) This subbasin is composed of all tributaries of the Red River in Oklahoma and portions thereof up-

stream to the Texas-Oklahoma state boundary at longitude 100 degrees west, beginning from Denison Dam and upstream to and including Buck Creek.

(b) The State of Oklahoma shall have free and unrestricted use of the water of this subbasin.

Section 4.03. Subbasin 3 - Intrastate streams - Texas.

(a) This includes the tributaries of the Red River in Texas, beginning from Denison Dam and upstream to and including Prairie Dog Town Fork Red River.

(b) The State of Texas shall have free and unrestricted use of the water in this subbasin.

Section 4.04. Subbasin 4 Mainstem of the Red River and Lake Texoma.

(a) This subbasin includes all of Lake Texoma and the Red River beginning at Denison Dam and continuing upstream to the Texas-Oklahoma state boundary at longitude 100 degrees west.

(b) The storage of Lake Texoma and flow from the mainstem of the Red River into Lake Texoma is apportioned as follows:

(1) Oklahoma 200,000 acre-feet and Texas 200,000 acre-feet, which quantities shall include existing allocations and uses; and

(2) Additional quantities in a ratio of fifty (50) percent to Oklahoma and fifty (50) percent to Texas.

Section 4.05. Special Provisions.

(a) Texas and Oklahoma may construct, jointly or in cooperation with the United States, storage or other facilities for the conservation and use of water;

provided that any facilities constructed on the Red River boundary between the two states shall not be inconsistent with the Federal legislation authorizing Denison Dam and Reservoir project.

(b) Texas shall not accept for filing, or grant a permit, for the construction of a dam to impound water solely for irrigation, flood control, soil conservation, mining and recovery of minerals, hydroelectric power, navigation, recreation and pleasure, or for any other purpose other than for domestic, municipal, and industrial water supply, on the mainstem of the North Fork Red River or any of its tributaries within Texas above Lugert-Altus Reservoir until the date that imported water, sufficient to meet the municipal and irrigation needs of Western Oklahoma is provided, or until January 1, 2000, which ever occurs first.

Comment

The water of the Red River above Lake Texoma is divided between Oklahoma and Texas. Each state is allowed full use of its intrastate tributaries. The flow of interstate tributaries is generally divided 60% to the upstream state and 40% to the downstream state. Because flows in Reach I are primarily from flood flows, an annual basis of accounting was adopted.

The flow of the mainstem of the Red River is divided equally between Oklahoma and Texas. Although Oklahoma contributes significantly more than 50% of the inflow to this subbasin, the equal division was agreed upon for two reasons: (a) it appears likely that Oklahoma's relative contribution will decrease in the future as she develops increased impoundment capabilities; and (b) it is a part of the compromise between Oklahoma and Texas reflected

by Section 4.05(b). Under Section 4.04, both Oklahoma and Texas have a firm right to 200,000 acre-feet per year from Lake Texoma and further quantities are divided on an equal basis.

Section 4.05(b) reflects the compromise of a long-standing dispute between Oklahoma and Texas over the water of the North Fork of the Red River and Sweetwater Creek. Altus-Lugert Reservoir has the capability of impounding virtually the entire flow of these tributaries, and the Altus-Lugert District has claimed a right to all such water based on the priority date of the reservoir's construction. Texas has refused to recognize that any such development could completely bar development of uses in Texas of the water of such tributaries.

Under the compromise, Texas will limit development on North Fork and Sweetwater Creek to projects justified on the basis of municipal, industrial, and domestic needs until the year 2000. However, if sufficient imported water becomes available in Western Oklahoma before 2000, Texas will be free to pursue full development of its 60% of these interstate tributaries. The January 1, 2000 dateline was agreed upon because the current repayment requirements of the water users from Lake Altus will have terminated by that date.

In Section 4.05, the States of Oklahoma and Texas call attention to the authorizing federal legislation for Denison Dam and Reservoir which permits total upstream development of the inflows into Lake Texoma by Oklahoma and Texas.

While Arkansas and Louisiana cannot require release from Lake Texoma, those power releases from Denison Dam which are not designated for downstream use will constitute undesignated flow and be

subject to Section 5.05. As further explained, hereafter upstream states must pass undesignated flows during periods of low flow for the benefit of the downstream states.

ARTICLE V

APPORTIONMENT OF WATER - REACH II

ARKANSAS, OKLAHOMA, TEXAS AND LOUISIANA

Subdivision of Reach II and allocation of water therein.

Reach II of the Red River is divided into topographic subbasins, and the water therein is allocated as follows:

Section 5.01. Subbasin 1 - Intrastate streams - Oklahoma.

(a) This subbasin includes those streams and their tributaries above existing, authorized or proposed last downstream major damsites, wholly in Oklahoma and flowing into Red River below Denison Dam and above the Oklahoma-Arkansas state boundary. These streams and their tributaries with existing, authorized or proposed last downstream major damsites are as follows:

			Location	
Stream	Site	Ac-ft	Latitude	Longitude
Island-Bayou	Albany	85,200	33°51.5'N	96°11.4'W
Blue River	Durant	147,000	33°55.5'N	96°04.2'W
Boggy River	Boswell	1,243,800	34°01.6'N	95°45.0'W
Kiamichi River	Hugo	240,700	34°01.0'N	95°22.6'W

(b) Oklahoma is apportioned the water of this subbasin and shall have unrestricted use thereof.

Section 5.02. Subbasin 2 - Intrastate streams - Texas.

(a) This subbasin includes those streams and their tributaries above existing authorized or proposed last downstream major damsites, wholly in Texas and flowing into Red River below Denison Dam and above the Texas-Arkansas state boundary. These streams and their tributaries with existing, authorized or proposed last downstream major damsites are as follows:

Stream	Site	Ac-ft	Location	
			Latitude	Longitude
Shawnee Creek	Randall Lake	5,400	33°48.1'N	96°34.8'W
Brushy Creek	Valley Lake	15,000	33°38.7'N	96'21.5'W
Bois d'Arc Creek	New Bonham Reservoir	130,600	33°42.9'N	95°58.2'W
Coffee Mill Creek	Coffee Mill Lake	8,000	33°44.1'N	95°58.0'W
Sandy Creek	Lake Crockett	3,900	33°44.5'N	95°55.5'W
Sanders Creek	Pat Mayse	124.500	33°51.2'N	95°32.9'W
Pine Creek	Lake Crook	11,011	33°43.7'N	95'34.0'W
Big Pine Creek	Big Pine Lake	138,600	33°52.0'N	95°11.7'W
Pecan Bayou	Pecan Bayou	625,000	33°41.1'N	94°58.7'W
Mud Creek	Liberty Hill	97,700	33°33.0'N	94°29.3'W
Mud Creek	KVW Ranch Lakes	3,440	33°34.8'N	94°27.3'W

(b) Texas is apportioned the water of this subbasin and shall have unrestricted use thereof.

Section 5.03. Subbasin 3 - Interstate Streams - Oklahoma and Arkansas.

(a) This subbasin includes Little River and its tributaries above Millwood Dam.

(b) The States of Oklahoma and Arkansas shall have free and unrestricted use of the water of this subbasin within their respective states, subject, however, to the limitation that Oklahoma shall allow a quantity of water equal to the 40 percent of the total

runoff originating below the following existing, authorized or proposed last major downstream damsites in Oklahoma to flow into Arkansas:

Stream	Site	Ac-ft	Location	
			Latitude	Longitude
Little River	Pine Creek	70,500	34°06.8'N	95°04.9'W
Glover Creek	Lukfata	258,600	34°08.5'N	94°55.4'W
Mountain Fork River	Broken Bow	470,100	34°08.9'N	94°41.2'W

(c) Accounting will be on an annual basis unless otherwise deemed necessary by the States of Arkansas and Oklahoma.

Section 5.04. Subbasin 4 Interstate streams - Texas and Arkansas.

(a) This subbasin shall consist of those streams and their tributaries above existing, authorized or proposed last downstream major damsites, originating in Texas and crossing the Texas-Arkansas state boundary before flowing into the Red River in Arkansas. These streams and their tributaries with existing, authorized or proposed last downstream major damsites are as follows:

Stream	Site	Ac-ft	Location	
			Latitude	Longitude
McKinney Bayou Trib.	Bringle Lake	3,052	33°30.6'N	94°06.2'W
Barkman Creek	Barkman Reservoir	15,900	33°29.7'N	94°10.3'W
Sulphur River	Texarkana	386,900	33°18.3'N	94°09.6'W

(b) The State of Texas shall have the free and unrestricted use of the water of this subbasin.

Section 5.05. Subbasin 5 - Mainstem of the Red River and tributaries.

(a) This subbasin includes that portion of the Red River, together with its tributaries, from Denison

Dam down to the Arkansas-Louisiana state boundary, excluding all tributaries included in the other four subbasins of Reach II.

(b) Water within this subbasin is allocated as follows:

(1) The Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second.

(2) Whenever the flow of the Red River at the Arkansas-Louisiana state boundary is less than 3,000 cubic feet per second, but more than 1,000 cubic feet per second, the States of Arkansas, Oklahoma, and Texas shall allow to flow into the Red River for delivery to the State of Louisiana a quantity of water equal to 40 percent of the total weekly runoff originating in subbasin 5 and 40 percent of undesignated water flowing into subbasin 5; provided, however, that this requirement shall not be interpreted to require any state to release stored water.

(3) Whenever the flow of the Red River at the Arkansas-Louisiana state boundary falls below 1,000 cubic feet per second, the States of Arkansas, Oklahoma, and Texas shall allow a quantity of water equal to all the weekly runoff originating in subbasin 5 and all undesignated water flowing into subbasin 5 within their respective states to flow into the Red River as required to maintain a 1,000 cubic foot per second flow at the Arkansas-Louisiana state boundary.

(c) Whenever the flow at Index, Arkansas, is less than 526 c.f.s., the States of Oklahoma and Texas shall each allow a quantity of water equal to 40 percent of the total weekly runoff originating in subbasin 5 within their respective states to flow into the Red River; provided, however, this provision shall be invoked only at the request of Arkansas, only after Arkansas has ceased all diversions from the Red River, itself, in Arkansas above Index, Arkansas, and only if the provisions of subsections 5.05(b)(2) and (3) have not caused a limitation of diversions in subbasin 5.

(d) No state guarantees to maintain a minimum low flow to a downstream state.

Section 5.06. Special Provisions.

(a) Reservoirs within the limits of Reach II, subbasin 5, with a conservation storage capacity of 1,000 acre feet or less in existence or authorized on the date of the Compact pursuant to the rights and privileges granted by a Signatory State authorizing such reservoirs, shall be exempt from the provisions of Section 5.05; provided, if any right to store water in, or use water from, an existing exempt reservoir expires or is cancelled after the effective date of the Compact the exemption for such rights provided by this section shall be lost.

(b) A Signatory State may authorize a change in the purpose or place of use of water from a reservoir exempted by subparagraph (a) of this section without losing that exemption, if the quantity of authorized use and storage is not increased.

(c) Additionally, exemptions from the provisions of Section 5.05 shall not apply to direct diversions from Red River to off-channel reservoirs or lands.

Comment

This reach, involving all four states, was the most difficult portion of the Compact to negotiate. Although it is an area of high rainfall, many reservoirs have been authorized for construction and many have already been constructed. The divergent water laws of the four states further complicate matters, in that Oklahoma and Texas have appropriative systems and have fully appropriated the ordinary flow of this reach within their boundaries while Arkansas and Louisiana operate under the riparian system and have conducted studies establishing present and future needs.

Another major consideration was that Louisiana has no reservoir sites of significant size. For this reason Louisiana could not store water in times of high flows to meet future needs. Upstream states never questioned that Louisiana needed and is entitled to water; the problem was to make provision for this flow without releases from upstream storage. Under no circumstance would upstream states agree to release water stored in upstream reservoirs for the benefit of downstream states, therefore there could be no guaranteed flows to downstream states.

As a solution to these opposing points of view, Reach II was divided into five subbasins. The upstream subbasins were separated from the mainstem subbasin using the criterion of the last downstream major dam, either existing, authorized or proposed on the effective date of the Compact. These are specified in the Compact to avoid any possible dispute. Within the upstream subbasins, flows were divided between the concerned states; below the last downstream dams, i.e., in subbasin 5, the upstream states agree to cooperate in assuring a reliable flow to Loui-

siana. "Weekly runoff" is used as the basis of apportionment to assure downstream states a relatively constant flow and a share of the low flows.

The last major downstream reservoirs listed in Sections 5.01-5.04 define the boundaries of the various subbasins of Reach II. In the case of authorized reservoirs that are not yet constructed, locations are approximate and will serve the purposes of compact administration until actual construction of the reservoirs. Data concerning reservoir capacity in the Compact and additional data in the Report of the Engineering Advisors is intended to provide background information; it is not intended to alter the subbasin definitions or modify the allocation of water in any way.

Subbasins 1 and 2 consist of the intrastate tributaries entirely within Oklahoma and Texas. Each state has full use of intrastate tributaries within its boundaries.

In subbasin 3, the States of Arkansas and Oklahoma have adopted a 60:40 division of the runoff in that part of the subbasin below the specified last downstream dams located in Oklahoma upstream from Millwood Dam. Low flows have been a problem for this area in the past, and will no doubt continue to be in the future. During low flow periods Arkansas will receive 40% of the runoff below the specified last downstream dams. Any reservoirs constructed in Oklahoma below the specified last downstream dams will be required to pass 40% of the runoff. This might prove critical during low flow periods. The states anticipate that annual accounting for runoff will generally be sufficient; however, if during low flow periods a shorter accounting period becomes necessary to assure Arkansas its share of low flows, Section 5.03(c)

allows the states to utilize a shorter accounting period.

Subbasin 4, although designated an "interstate stream," lies wholly within Texas. Below the last downstream dams, the tributaries flow into Arkansas and then to the mainstem. The last downstream dams specified in Section 5.04(b) are analogous to those described by Section 5.03(b) located in Oklahoma. On these tributaries, however, there is no downstream dam in Louisiana comparable to Millwood. Consequently, the subbasin is defined by the last downstream dams in Texas, with the remainder being included in the mainstem subbasin.

Within subbasin 4, Texas has fully appropriated the available low flows. Lake Wright Patman, on the Sulphur River five miles above the Texas-Arkansas boundary, operates under permits from the State of Texas authorizing use of up to 180,000 acre-feet annually. As a practical matter, however, the reservoir serves as a common supply of municipal and industrial water for the Texarkana area of both Arkansas and Texas. Additionally, the reservoir currently releases up to 96 cfs which benefits downstream fish and wildlife, and the federal authorizing legislation guarantees a minimum release of 10 cfs. The existence of the reservoir guarantees low flow to Arkansas greater than the historical low flows without the reservoir. Thus, although Arkansas receives no specific allocation from subbasin 4 under the Compact, it obtains considerable benefit from this water.

In subbasin 5, as previously noted, the upstream states cooperate in assuring reliable flows to Arkansas and Louisiana. This is accomplished by keying the upstream states' obligation to the flow at the Arkansas-Louisiana boundary. When the flow is high,

above 3000 cfs, all states are free to use whatever amount of water they can put to beneficial use. If the states have competing uses and the amount of water available in excess of 3000 cfs cannot satisfy all such uses, each state will honor the other's right to 25% of the excess flow.

When flows are less than 3000 cfs, but more than 1000 cfs, upstream states must allow 40% of the total runoff originating within subbasin 5 within each state to pass in order to maintain the mainstem's flow. Additionally, 40% of the undesignated flows must be passed.

When the Arkansas-Louisiana boundary flow drops below 1000 cfs, 100% of upstream runoff within subbasin 5 and all undesignated releases in such subbasin will be passed, as necessary, to assure maintenance of the 1000 cfs flow.

Two points should be mentioned in connection with the low flow obligations of Section 5.05. First, upstream states are not required to make releases from storage or to pass water from other subbasins in order to maintain the flow at the Arkansas-Louisiana boundary -- although, an upstream state could do either in order to allow its diverters in subbasin 5 to use equivalent quantities during low flow periods. Second, it should be emphasized that these periods of low flow on the mainstem are relatively rare. Historic records indicate that flows of 1000 cfs or less have occurred only 0.2% of the time at the Arkansas-Louisiana boundary. Flows less than 3000 cfs have occurred only 4.2% of the time during the period of record.

The compact negotiators anticipate that efforts to assure minimum flows at the Arkansas-Louisiana boundary will also effectively assure minimum flows

at the Arkansas-Oklahoma boundary. This belief is based upon a study of historic records, at both the Arkansas Louisiana and Arkansas-Oklahoma boundaries, indicating the similarity of low river flows at these two points.

Subsection 5.05(C) is designed to handle the rare circumstance where inflows from the Little River watershed would cause a flow of 3000 cfs at the Arkansas-Louisiana state boundary while little or no flow is entering upstream to provide flow at the Arkansas-Oklahoma state boundary. In this unusual circumstance subsection 5.05(c) rather than subsection 5.05(b)(1), will govern diversions for Arkansas, Oklahoma, and Texas. This protection of flows at the Arkansas-Oklahoma state boundary is in the interest of providing for possible future water needs on the mainstem of the Red River in Arkansas.

Section 5.05, without Section 5.06, would require the operators of small reservoirs in subbasin 5 to release a quantity of water, during periods of low flow at the Arkansas-Louisiana boundary, based on the reservoirs' inflow for the period. Because the right to operate such reservoirs may be a vested property right in Oklahoma and Texas, and because many of the existing dams lack the release capabilities that would be necessary to satisfy such a requirement, Section 5.06 was inserted. It exempts these existing reservoirs (listed in the Engineering Supplement to the Compact) from the requirements of Section 5.05. The quantity of water involved is not large and any effect on the state boundary flow is expected to be minimal.

ARTICLE VI

APPORTIONMENT OF WATER - REACH III ARKANSAS, LOUISIANA, AND TEXAS

Subdivision of Reach III and allocation of water therein.

Reach III of the Red River is divided into topographic subbasins, and the water therein allocated, as follows:

Section 6.01. Subbasin I - Interstate streams Arkansas and Texas.

(a) This subbasin includes the Texas portion of those streams crossing the Arkansas-Texas state boundary one or more times and flowing through Arkansas into Cypress Creek-Twelve Mile Bayou watershed in Louisiana.

(b) Texas is apportioned sixty (60) percent of the runoff of this subbasin and shall have unrestricted use thereof; Arkansas is entitled to forty (40) percent of the runoff of this subbasin.

Section 6.02. Subbasin 2 - Interstate streams Arkansas and Louisiana.

(a) This subbasin includes the Arkansas portion of those streams flowing from Subbasin 1 into Arkansas, as well as other streams in Arkansas which cross the Arkansas-Louisiana state boundary one or more times and flow into Cypress Creek-Twelve Mile Bayou watershed in Louisiana.

(b) Arkansas is apportioned sixty (60) percent of the runoff of this subbasin and shall have unrestricted use thereof; Louisiana is entitled to forty (40) percent of the runoff of this subbasin.

Section 6.03. Subbasin 3 Interstate streams - Texas and Louisiana.

(a) This subbasin includes the Texas portion of all tributaries crossing the Texas-Louisiana state boundary one or more times and flowing into Caddo Lake, Cypress Creek-Twelve Mile Bayou or Cross Lake, as well as the Louisiana portion of such tributaries.

(b) Texas and Louisiana within their respective boundaries shall each have the unrestricted use of the water of this subbasin subject to the following allocation:

(1) Texas shall have the unrestricted right to all water above Marshall, Lake O' the Pines, and Black Cypress damsites; however, Texas shall not cause runoff to be depleted to a quantity less than that which would have occurred with the full operation of Franklin County, Titus County, Ellison Creek, Johnson Creek, Lake O' the Pines, Marshall, and Black Cypress Reservoirs constructed, and those other impoundments and diversions existing on the effective date of this Compact. Any depletions of runoff in excess of the depletions described above shall be charged against Texas' apportionment of the water in Caddo Reservoir.

(2) Texas and Louisiana shall each have the unrestricted right to use fifty (50) percent of the conservation storage capacity in the present Caddo Lake for the impoundment of water for state use, subject to the provision that supplies for existing uses of water from Caddo Lake, on date of Compact, are not reduced.

(3) Texas and Louisiana shall each have the unrestricted right to fifty (50) percent of the conservation storage capacity of any future enlargement of Caddo Lake, provided, the two states may negotiate for the release of each state's share of the storage space on terms mutually agreed upon by the two states after the effective date of this Compact.

(4) Inflow to Caddo Lake from its drainage area downstream from Marshall, Lake O' the Pines, and Black Cypress damsites and downstream from other last downstream dams in existence on the date of the signing of the Compact document by the Compact Commissioners, will be allowed to continue flowing into Caddo Lake except that any manmade depletions to this inflow by Texas will be subtracted from the Texas share of the water in Caddo Lake.

(c) In regard to the water of interstate streams which do not contribute to the inflow to Cross Lake or Caddo Lake, Texas shall have the unrestricted right to divert and use this water on the basis of a division of runoff above the state boundary of sixty (60) percent to Texas and forty (40) percent to Louisiana.

(d) Texas and Louisiana will not construct improvements on the Cross Lake watershed in either state that will affect the yield of Cross Lake; provided, however, this subsection shall be subject to the provisions of Section 2.08.

Section 6.04. Subbasin 4 - Intrastate streams - Louisiana.

(a) This subbasin includes that area of Louisiana in Reach III not included within any other subbasin.

(b) Louisiana shall have free and unrestricted use of the water of this subbasin.

Comment

In subbasins 1 and 2 of Reach III the Compact apportions 60% of the runoff of interstate tributaries to the upstream state of origin and requires that 40% be passed to the downstream state.

Subbasin 3's apportionment reflects both Texas' desire to protect authorized and constructed reservoirs and Louisiana's desire to assure an adequate water supply to the Shreveport area. A 60:40 division of runoff below the last downstream dam was not feasible, as Caddo Lake is on the state boundary and its yield is to be shared equally by the two states. Section 6.03 protects the yield of Caddo Lake, exempting only existing upstream water rights and impoundments which are existing, proposed or authorized on the effective date of the Compact.

Subject to the exemption of domestic and livestock uses, Texas' apportionment allows no new diversions which would decrease the runoff below an amount equivalent to that available with full operation of the existing, proposed and authorized impoundments and existing water rights. Any depletion in excess of this amount will be balanced against Texas' portion of Caddo Lake storage.

The yield of Cross Lake is also protected. Additionally, subject to each state assuming its proportional financial burden, it is provided that both states may share equally in any enlargement of Caddo Lake.

ARTICLE VII

APPORTIONMENT OF WATER - REACH IV ARKANSAS AND LOUISIANA

Subdivision of Reach IV and allocation of water therein.

Reach IV of the Red River is divided into topographic subbasins, and the water therein allocated as follows:

Section 7.01. Subbasin 1 - Intrastate streams - Arkansas.

(a) This subbasin includes those streams and their tributaries above last downstream major damsites originating in Arkansas and crossing the Arkansas-Louisiana state boundary before flowing into the Red River in Louisiana. Those major last downstream damsites are as follows:

			Location	
Stream	Site	Ac-ft	Latitude	Longitude
Ouachita River	Lake Catherine	19,000	34°26.6'N	93°01.6'W
Caddo River	DeGray Lake	1,377,000	34°13.2'N	93°06.6'W
Little Missouri River	Lake Greeson	600,000	34°08.9'N	93°42.9'W
Alum Fork, Saline River	Lake Winona	63,264	32°47.8'N	92°51.0'W

(b) Arkansas is apportioned the waters of this subbasin and shall have unrestricted use thereof.

Section 7.02. Subbasin 2 - Interstate Streams - Arkansas and Louisiana.

(a) This subbasin shall consist of Reach IV less subbasin 1 as defined in Section 7.01(a) above.

(b) The State of Arkansas shall have free and unrestricted use of the water of this reach subject to the limitation that Arkansas shall allow a quantity of water equal to forty (40) percent of the weekly runoff

originating below or flowing from the last downstream major damsite to flow into Louisiana. Where there are no designated last downstream damsites, Arkansas shall allow a quantity of water equal to forty (40) percent of the total weekly runoff originating above the state boundary to flow into Louisiana. Use of water in this subbasin is subject to low flow provisions of subparagraph 7.02(b).

Section 7.03. Special Provisions.

(a) Arkansas may use the beds and banks of segments of Reach IV for the purpose of conveying its share of water to designated downstream diversions.

(b) The State of Arkansas does not guarantee to maintain a minimum low flow for Louisiana in Reach IV. However, on the following streams when the use of water in Arkansas reduces the flow at the Arkansas-Louisiana state boundary to the following amounts:

(1) Ouachita - 780 cfs

(2) Bayou Bartholomew - 80 cfs

(3) Boeuf River - 40 cfs

(4) Bayou Macon - 40 cfs

the State of Arkansas pledges to take affirmative steps to regulate the diversions of runoff originating or flowing into Reach IV in such a manner as to permit an equitable apportionment of the runoff as set out herein to flow into the State of Louisiana. In its control and regulation of the water of Reach IV any adjudication or order rendered by the State of Arkansas or any of its instrumentalities or agencies affecting the terms of this Compact shall not be effective against the State of Louisiana nor any of its citi-

zens or inhabitants until approved by the Commission.

Comment

Section 7.01(b) uses the same 60:40 division principle as was used in other portions of the Compact for allocating water of interstate tributaries between two states. "Weekly runoff" is used as a basis for apportionment to assure the State of Louisiana a relatively constant flow and a fair share of the low flow.

Section 7.03(b) governs during extreme low flow periods in order to permit and insure a reasonable and equitable stream flow into the State of Louisiana.

The remainder of Article VII is considered self-explanatory.

ARTICLE VIII

APPORTIONMENT OF WATER - REACH V

Section 8.01. Reach V of the Red River consists of the mainstem Red River and all of its tributaries lying wholly within the State of Louisiana. The State of Louisiana shall have free and unrestricted use of the water of this subbasin.

Comment

Article VIII is self-explanatory.

ARTICLE IX

ADMINISTRATION OF THE COMPACT

Section 9.01. There is hereby created an interstate administrative agency to be known as the "Red River Compact Commission," hereinafter called the "Commission." The Commission shall be composed of

two representatives from each Signatory State who shall be designated or appointed in accordance with the laws of each state, and one Commissioner representing the United States, who shall be appointed by the President. The Federal Commissioner shall be the Chairman of the Commission but shall not have the right to vote. The failure of the President to appoint a Federal Commissioner will not prevent the operation or effect of this Compact, and the eight representatives from the Signatory States will elect a Chairman for the Commission.

Section 9.02. The Commission shall meet and organize within 60 days after the effective date of this Compact. Thereafter, meetings shall be held at such times and places as the Commission shall decide.

Section 9.03. Each of the two Commissioners from each state shall have one vote; provided, however, that if only one representative from a state attends he is authorized to vote on behalf of the absent Commissioner from that state. Representatives from three states shall constitute a quorum. Any action concerned with administration of this Compact or any action requiring compliance with specific terms of this Compact shall require six concurring votes. If a proposed action of the Commission affects existing water rights in a state, and that action is not expressly provided for in this Compact, eight concurring votes shall be required.

Section 9.04.

(a) The salaries and personal expenses of each state's representative shall be paid by the government that it represents, and the salaries and personal expenses of the Federal Commissioner will be paid for by the United States.

(b) The Commission's expenses for any additional stream flow gaging stations shall be equitably apportioned among the states involved in the reach in which the stream flow gaging stations are located.

(c) All other expenses incurred by the Commission shall be borne equally by the Signatory States and shall be paid by the Commission out of the "Red River Compact Commission Fund." Such Fund shall be initiated and maintained by equal payments of each state into the fund. Disbursement shall be made from the fund in such manner as may be authorized by the Commission. Such fund shall not be subject to audit and accounting procedures of the state; however, all receipts and disbursements of the fund by the Commission shall be audited by a qualified independent public accountant at regular intervals, and the report of such audits shall be included in and become a part of the annual report of the Commission. Each state shall have the right to make its own audit of the accounts of the Commission at any reasonable time.

Comment

This article creates the administrative agency which will administer the terms of this Compact after its ratification by the states and the consent of Congress. The provisions are similar to those adopted in a number of other interstate stream compacts.

Section 9.01 provides for two members from each of the Signatory States as the Commission members. It is anticipated that companion legislation may be necessary to specify appointment of Commissioners from one or more states.

Section 9.03 provides that each Commissioner shall have one vote; however, in the absence of a Commissioner the other Commissioner for that state is authorized to vote on his or her behalf. This section further defines a quorum in conducting the business affairs of the Commission.

Section 9.04 sets forth the procedure for paying the salaries and expenses of the Commissioners and costs incurred by the Commission in the administration of the Compact. This section also creates a compact fund which is essential to flexibility of operation. In addition, it provides for audit procedures and the report of such audit.

The provisions of Section 9.04, concerning financial expenses incurred by the Commission, are not intended to prevent the Commission from taking advantage of any financial assistance that might be available in the future. If, for example, additional stream flow gaging stations are needed and the Commission is able to establish such stations cooperatively with U.S.G.S., the Compact's terms would not prevent the Commission from taking advantage of such federal financial assistance; nor would the Compact prevent the Commission from sharing stream gage operating expenses with U.S.G.S. At the same time, the Compact is not intended to legally obligate the United States to share any Commission expenses that it would not share in the normal course of events.

ARTICLE X

POWERS AND DUTIES OF THE COMMISSION

Section 10.01. The Commission shall have the power to:

(a) Adopt rules and regulations governing its operation and enforcement of the terms of the Compact;

(b) Establish and maintain an office for the conduct of its affairs and, if desirable, from time to time, change its location;

(c) Employ or contract with such engineering, legal, clerical and other personnel as it may determine necessary for the exercise of its functions under this Compact without regard to the Civil Service Laws of any Signatory State; provided that such employees shall be paid by and be responsible to the Commission and shall not be considered employees of any Signatory State;

(d) Acquire, use and dispose of such real and personal property as it may consider necessary;

(e) Enter into contracts with appropriate State or Federal agencies for the collection, correlation and presentation of factual data, for the maintenance of records and for the preparation of reports;

(f) Secure from the head of any department or agency of the Federal or State government such information as it may need or deem to be useful for carrying out its functions and as may be available to or procurable by the department or agency to which the request is addressed; provided such information is not privileged and the department or agency is not precluded by law from releasing same.

(g) Make findings, recommendations or reports in connection with carrying out the purposes of this Compact, including, but not limited to, a finding that a Signatory State is or is not in violation of any of the provisions of this Compact. The Commission is authorized to make such investigations and studies, and to hold such hearings as it may deem necessary

for said purposes. It is authorized to make and file official certified copies of any of its findings, recommendations or reports with such officers or agencies of any Signatory State, or the United States, as may have any interest in or jurisdiction over the subject matter. The making of findings, recommendations, or reports by the Commission shall not be a condition precedent to the instituting or maintaining of any action or proceeding of any kind by a Signatory State in any court or tribunal, or before any agency or officer, for the protection of any right under this Compact or for the enforcement of any of its provisions; and

(h) Print or otherwise reproduce and distribute its proceedings and reports.

Section 10.02. The Commission shall:

(a) Cause to be established, maintained, and operated such stream, reservoir and other gaging stations as are necessary for the proper administration of the Compact;

(b) Cause to be collected, analyzed and reported such information on stream flows, water quality, water storage and such other data as are necessary for the proper administration of the Compact;

(c) Perform all other functions required of it by the Compact and do all things necessary, proper and convenient in the performance of its duties thereunder;

(d) Prepare and submit to the governor of each of the Signatory States a budget covering the anticipated expenses of the Commission for the following fiscal biennium;

(e) Prepare and submit an annual report to the governor of each Signatory State and to the Presi-

dent of the United States covering the activities of the Commission for the preceding fiscal year, together with an accounting of all funds received and expended by it in the conduct of its work;

(f) Make available to the governor or to any official agency of a Signatory State or to any authorized representative of the United States, upon request, any information within its possession;

(g) Not incur any obligation in excess of the unencumbered balance of its funds, nor pledge the credit of any of the Signatory States; and

(h) Make available to a Signatory State or the United States in any action arising under this Compact, without subpoena, the testimony of any officer or employee of the Commission having knowledge of any relevant facts.

Comment

Article X sets forth the powers and duties of the administrative Commission. It provides the Commission with the necessary latitude and flexibility to carry out the provisions and purposes of the Compact.

Section 10.01 enumerates the powers of the Commission while 10.02 sets out certain specific duties of the Commission. Other duties not expressly stated in Section 10.02 are implied in the inherent powers granted in Section 10.01.

Section 10.01(e) enables the Commission to obtain data which is important to the Commission's work and findings. Most data needed by the Commission will be gathered by other agencies; however, there might be times when such data is not available from other agencies, and it would be necessary for

the Commission to collect such data, either itself or by contract.

While it is not anticipated that the Commission will obtain the information mentioned in Section 10.01(f) by adverse means, this section amounts to an agreement by all states to openly provide the Commission any information requested which is not confidential or otherwise privileged.

Subsections 10.02(d) and (e) provide for annual budgets and annual reports to be submitted to the respective Governors of the Signatory States and to the President of the United States, but set no date for the submission of these reports. Therefore, it is incumbent upon the Compact Commission to set such a date in the rules and regulations of the Commission. This provides flexibility by allowing such date to be changed if and when it might become necessary.

All other sections are self-explanatory.

ARTICLE XI

POLLUTION

Section 11.01. The Signatory States recognize that the increase in population and the growth of industrial, agricultural, mining and other activities combined with natural pollution sources may lead to a diminution of the quality of water in the Red River Basin which may render the water harmful or injurious to the health and welfare of the people and impair the usefulness or public enjoyment of the water for beneficial purposes, thereby resulting in adverse social, economic, and environmental impacts.

Section 11.02. Although affirming the primary duty and responsibility of each Signatory State to take appropriate action under its own laws to pre-

vent, diminish, and regulate all pollution sources within its boundaries which adversely affect the water of the Red River Basin, the states recognize that the control and abatement of the naturally-occurring salinity sources as well as, under certain circumstances, the maintenance and enhancement of the quality of water in the Red River Basin may require the cooperative action of all states.

Section 11.03. The Signatory States agree to cooperate with agencies of the United States to devise and effectuate means of alleviating the natural deterioration of the water of the Red River Basin.

Section 11.04. The Commission shall have the power to cooperate with the United States, the Signatory States and other entities in programs for abating and controlling pollution and natural deterioration of the water of the Red River Basin, and to recommend reasonable water quality objectives to the states.

Section 11.05. Each Signatory State agrees to maintain current records of waste discharges into the Red River Basin and the type and quality of such discharges, which records shall be furnished to the Commission upon request.

Section 11.06. Upon receipt of a complaint from the governor of a Signatory State that the interstate water of the Red River Basin in which it has an interest are being materially and adversely affected by pollution and that the state in which the pollution originates has failed after reasonable notice to take appropriate abatement measures, the Commission shall make such findings as are appropriate and thereafter provide such findings to the governor of the state in which such pollution originates and request appropriate corrective action. The Commission, how-

ever, shall not take any action with respect to pollution which adversely affects only the state in which such pollution originates.

Section 11.07. In addition to its other powers set forth under this Article, the Commission shall have the authority, upon receipt of six concurring votes, to utilize applicable Federal statutes to institute legal action in its own name against the person or entity responsible for interstate pollution problems; provided, however, sixty (60) days before initiating legal action the Commission shall notify the Governor of the State in which the pollution source is located to allow that state an opportunity to initiate action in its own name.

Section 11.08. Without prejudice to any other remedy available to the Commission, or any Signatory State, any state which is materially and adversely affected by the pollution of the water of the Red River Basin by pollution originating in another Signatory State may institute a suit against any individual, corporation, partnership, or association, or against any Signatory State or political or governmental subdivision thereof, or against any officer, agency, department, bureau, district or instrumentality of or in any Signatory State contributing to such pollution in accordance with applicable Federal statutes. Nothing herein shall be construed as depriving any persons of any rights of action relating to pollution which such person would have if this Compact had not been made.

Comment

While the states acknowledge that there is no serious manmade interstate pollution problem in the Red River Basin at present, they recognize their ob-

ligation to maintain the adequacy of the basin's water quality by all available means.

Natural salt pollution in the Red River Basin is, however, seriously detrimental to all states. By this article each state is committing itself to work cooperatively with each other and the United States to devise and effectuate means of alleviating the natural deterioration of the water of the Red River Basin.

It is not intended for the Commission to displace any state pollution control agency or to usurp any of the powers of such an agency, but rather to provide a vehicle for the amicable solution of potential interstate pollution problems. Should all attempts at a cooperative solution fail, the Commission is authorized to utilize the provisions of the Federal Water Pollution Control Act.

Additionally, if the concerned states and their pollution control agencies agree that such an arrangement is desirable in the future, it is contemplated that the Commission may cooperate with state pollution control agencies to coordinate duties such as planning, development of uniform interstate water quality standards, and other functions under the Federal Water Pollution Control Act.

ARTICLE XII

TERMINATION AND AMENDMENT OF COMPACT

Section 12.01. This Compact may be terminated at any time by appropriate action of the legislatures of all of the four Signatory States. In the event of such termination, all rights established under it shall continue unimpaired.

Section 12.02. This Compact may be amended at any time by appropriate action of the legislatures of

all Signatory States that are affected by such amendment. The consent of the United States Congress must be obtained before any such amendment is effective.

Comment

This article affirms that no action can be taken to modify the provisions of the Compact without unanimous action of the Signatory States, their respective legislatures, and the United States Congress. It also recognizes the Signatory States' right to terminate the Compact by taking appropriate action, and the protection of any vested rights which may have inured during the life of the Compact.

ARTICLE XIII

RATIFICATION AND EFFECTIVE DATE OF COMPACT

Section 13.01. Notice of ratification of this Compact by the legislature of each Signatory State shall be given by the governor thereof to the governors of each of the other Signatory States and to the President of the United States. The President is hereby requested to give notice to the governors of each of the Signatory States of the consent to this Compact by the Congress of the United States.

Section 13.02. This Compact shall become effective, binding and obligatory when, and only when:

(a) It has been duly ratified by each of the Signatory States; and

(b) It has been consented to by an Act of the Congress of the United States, which Act provides that:

> Any other statute of the United States to the contrary notwithstanding, in any case or controversy:

which involves the construction or application of this Compact;

in which one or more of the Signatory States to this Compact is a plaintiff or plaintiffs; and

which is within the judicial power of the United States as set forth in the Constitution of the United States;

and without any requirement, limitation or regard as to the sum or value of the matter in controversy, or of the place of residence or citizenship of, or of the nature, character or legal status of, any of the other proper parties plaintiff or defendant in such case or controversy:

The consent of Congress is given to name and join the United States as a party defendant or otherwise in any such case or controversy in the Supreme Court of the United States if the United States is an indispensable party thereto.

Section 13.03. The United States District Courts shall have original jurisdiction (concurrent with that of the Supreme Court of the United States, and concurrent with that of any other Federal or state court, in matters in which the Supreme Court, or other court has original jurisdiction) of any case or controversy involving the application or construction of this Compact; that said jurisdiction shall include, but not be limited to, suits between Signatory States; and that the venue of such case or controversy may be brought in any judicial district in which the acts complained of (or any portion thereof) occur.

Comment

The effective date of this Compact shall be the date the approving Act of the United States Congress is signed by the President of the United States.

Submitted by the Red River Compact Commission Legal Advisory Committee.

John Gibson, Legal Advisor State of Arkansas	Jim Barnett, Legal Advisor State of Oklahoma
Doug Caroom, Legal Advisor State of Texas	H. David Smith, Legal Advisor State of Louisiana

Approved by the Red River Compact Commission on the 19th day of September 1979.

R. C. MARSHALL
Major General, USA
Chairman, Red River Compact Commission

Red River Compact Interim Rules and Regulations to Compute and Enforce Compact Compliance (June 2012)

1. These rules and regulations to be used to compute and enforce Compact compliance within Subbasin 5 of Reach II, Red River Compact, are adopted subject to the following conditions and assumptions:

   a. It is fully understood that these rules and regulations should be modified as new or improved gaging stations are constructed, whenever experience or detailed studies demonstrate the need for modification, and if the Commission should modify its interpretation of Compact provisions relating to this Subbasin.

   b. Definitions:

      (1) "Diversion" as used in these rules and regulations, is the net loss to a water source from use by a diverter, and is computed as the diversion from the water source minus the part of the diversion which is returned to the water source. Normally, return flows must be measured to be considered; however, the EAC may consider and recommend exceptions. As used herein, "diversion" is equivalent to "net diversion" from a water source and to "depletion" or "consumptive use" of a water source.

2. **Management of Compact Compliance Computations.**

   a. Management Using State Centers:

      (1) State EAC representatives will estab-

lish State Computation Control Centers

(a) Staff representatives will gather data, exchange data and meet via conference call to check on computation results, if necessary.

(b) EAC will determine compliance with Compact.

b. **Management Period for Weekly Flow and Diversions:**

(1) Next week's State diversions will be allocated based on last week's compliance computations.

(2) It is each State's responsibility to limit its total State diversion allocation among its State diverters.

(3) The weekly period for use and flow data will start and end at 8:00 a.m. on Tuesday of each week.

(4) Data collection and dissemination will be completed on Tuesday of each week.

(5) Computation of Compliance will be completed on Wednesday of each week.

(6) Each State can request an update at any time.

c. **Management Improvement Studies:** The EAC will monitor the effect on accounting management of the following factors and will report thereon to the Commission whenever procedure changes appears desirable.

(1) Errors caused by travel time.

(2) Future restrictions computed from past week's data.

(3) Failure to consider channel loss.

(4) Failure to consider ungaged return flows.

(5) Failure to consider flow trends.

(6) Addition of needed gages.

3. **Enforcement of Compact Compliance Requirements.** Each State will be responsible for insuring that the sum of the diversions by State users does not exceed the total State diversion authorized by the Red River Compact. In this regard, each State will be responsible for establishing clear legal authority within its State for enforcing the restrictions imposed by the Red River Compact.

4. **Data Reporting Procedures.**

   a. **Streamflow Gaging Station Records:** The EAC will make arrangements with the Corps of Engineers, the U.S. Geological Survey and with States as required to collect daily and/or weekly data, as needed, and forward to the State Computation and Control Centers.

   b. **Diversion Records:** Each State will be responsible to collect daily and/or weekly data, as needed, and forward to the State Computation and Control Centers.

   c. **Archived Records:** Records will be archived by Commission Chairman.

5. General Compliance Requirements of Section 5.05, Red River Compact.

a. Section 5.05 (b)(1):

(1) **Compact prescribes:** "The Signatory States shall have equal rights to the use of the runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second."

(2) In computing the Subbasin 5 water allocation, when the flow of the Red River at the Arkansas-Louisiana State Boundary is 3,000 cfs or more and the total runoff and undesignated flow of Subbasin 5 is greater than or equal to 7,500 cfs but less than or equal to 12,000 cfs, Louisiana's allocation shall be 3,000 cfs and each of the three upstream states will equally share the runoff and undesignated flow in excess of 3,000 cfs.

(3) When the total runoff and undesignated flow of Subbasin 5 is 12,000 cfs or more, each of the signatory states shall be entitled to 25% of the total runoff and undesignated flow.

(4) State compliance with Section 5.05 (b)(1) does not need to be determined except when specifically requested by a Compact State.

b. Section 5.05 (b)(2):

(1) **The Compact states:** "Whenever the flow of the Red River at the Arkansas-Louisiana state boundary is less than 3,000 cubic feet per second, but more than 1,000 cubic feet per second, the States of Arkansas, Oklahoma, and Texas shall allow to flow into the Red River for delivery to the State of Louisiana a quantity of water equal to 40 percent of the total weekly runoff originating in subbasin 5 and 40 percent of undesignated water flowing into subbasin 5; provided, however, that this requirement shall not be interpreted to require any state to release stored water."

(2) In computing the Subbasin 5 water allocation to Louisiana when flow of Red River at the Arkansas-Louisiana State boundary is less than 3,000 cfs but more than 1,000 cfs, the Subbasin. 5 runoff for each of the three upstream States and the undesignated water flowing into Subbasin 5 from each upstream State totaled, and the three upstream States should allow to pass to Louisiana 40 percent of the total, or 1,000 cfs, whichever is greater.

(3) When the Subbasin 5 runoff plus undesignated water totals at least 2,500 cfs and not more than 7,500 cfs, each of the three upstream States are allocated 60 percent of its runoff plus undesignated inflow and the other 40 percent is to be

allowed to flow into the Red River for delivery to Louisiana.

(4) When the Subbasin 5 runoff plus undesignated water totals at least 1,000 cfs but less than 2,500 cfs, the allocation to Louisiana is 1,000 cfs because of Compact Section 5.05 (b)(3). The total Subbasin 5 runoff plus undesignated water is compared to the Louisiana allocation of 1,000 cfs and a percentage is established. Each of the tree upstream States will be entitled to divert and use a quantity computed using (100 percent minus the established percentage) times (the total of runoff from its Subbasin 5 areas plus undesignated water flowing into its Subbasin 5 areas).

(5) This Compact compliance determination should be made whenever the flow of the Red River at the Arkansas-Louisiana State boundary falls below 3,000 cfs and is more than 1,000 cfs.

c. Section 5.05 (b)(3):

(1) **The Compact states:** "Whenever the flow of the Red River at the Arkansas-Louisiana state boundary falls below 1,000 cubic feet per second, the States of Arkansas, Oklahoma, and Texas shall allow a quantity of water equal to all the weekly runoff originating in Subbasin 5 and all undesignated water flowing into Subbasin 5 within their respective states to flow into the Red River as required to maintain a 1,000 cubic

foot per second flow at the Arkansas-Louisiana state boundary."

(2) In computing the Subbasin 5 allocation when the flow of the Red River at the Arkansas-Louisiana State boundary falls below 1,000 cfs, and when the Subbasin 5 runoff and undesignated water flowing into Subbasin 5 total 1,000 cfs or less, all flow must be passed to Louisiana.

(3) When the Subbasin 5 runoff and undesignated water flowing into Subbasin 5 total more than 1,000 cfs but less than 2,500 cfs, Louisiana is allocated 1,000 cfs. This 1,000 cfs Louisiana entitlement is compared to the total runoff plus undesignated water and a percentage is established. Each of the three upstream States will be entitled to divert and use a quantity computed using (100 percent minus the established percentage) times (its total State runoff and undesignated water inflow).

(4) See rules for Compact Section 5.05 (b)(2) when the Subbasin 5 runoff and undesignated water flowing into Subbasin 5 total 2,500 cfs or more up to 7,500 cfs.

(5) This Compact compliance determination should be made whenever the flow of the Red River at the Arkansas-Louisiana State boundary falls below 1,000 cfs.

d. Section 5.05 (c):

(1) **The Compact states:** "Whenever the flow at Index, Arkansas is less than 526 c.f.s., the states of Oklahoma and Texas shall each allow a quantity of water equal to 40 percent of the total weekly runoff originating in Subbasin 5 within their respective states to flow into the Red River; provided however, this provision shall be invoked only at the request of Arkansas, only after Arkansas has ceased all diversions from the Red River itself in Arkansas above Index, and only if the provisions of Subsections 5.05 (b)(2) and (3) have not caused a limitation of diversions in subbasin 5."

(2) In computing the Subbasin 5 allocation when flow of Red River at Index Arkansas is less than 256 cfs, the States of Oklahoma and Texas are to pass 40 percent of weekly runoff from respective Subbasin 5 areas.

(3) This Compact compliance determination will be made only when requested by Arkansas, only after Arkansas has ceased all diversions from the Red River, and only if the provisions of subsections 5.05 (b)(2) and (3) have not caused a limitation of diversions in Subbasin 5.

6. Procedures (Disregarding Designated Flows) to Compute State Runoff, Runoff plus Undesignated Inflows, and Flow of Red River at Arkansas-Louisiana State Boundary.

a. Oklahoma.

(1) **Runoff plus Undesignated Inflows of Denison Dam to DeKalb Gage:**

(a) Kiamichi River near Hugo, OK, Gage flow, plus Muddy Boggy Creek near Unger, OK, Gage flow plus Blue River near Blue, OK Gage flow, plus

(b) Fifty percent of (DeKalb Gage flow, plus Texas and Oklahoma diversions, minus gaged flows at Kiamichi River near Hugo, Ok, Muddy Boggy Creek near Unger, OK, Blue River near Blue, OK, and Sanders Creek near Chicota, Texas, streamflow Gages).

(2) **Runoff plus Undesignated Inflows, DeKalb Gage to Oklahoma-Arkansas State line:** Fifteen and one-half (15.5) percent of (Index Gage flow, minus DeKalb Gage flow, plus Oklahoma, Texas and Arkansas diversions downstream from DeKalb Gage).

(3) **Runoff only, Denison Dam to Oklahoma-Arkansas State line.**

(a) Fifty percent of (DeKalb Gage flow, minus Red River at Denison Dam Gage flow, plus Texas and Oklahoma diversions upstream from DeKalb Gage, minus Blue River near Blue, OK, Gage flow, minus Muddy Boggy Creek near Unger-Okla Gage flow, minus Kiamichi River near Hugo-Okla. Gage flow minus Gage flow), plus

(b) Fifteen and one-half (15.5) percent of (Index Gage flow, minus DeKalb Gage flow, plus Oklahoma, Texas and Arkansas diversions between DeKalb and Index Gages).

b. Texas

(1) **Runoff plus Undesignated Inflows, DeKalb Gage to Index Gage:**

(a) Sanders Creek near Chicota Gage flow, plus

(b) Fifty percent of: (DeKalb Gage flow, plus Texas and Oklahoma diversions, minus gaged flows at Kiamichi River near Hugo, OK, Muddy Boggy Creek near Unger, OK, Blue River near Blue, OK, and Sanders Creek near Chicota, TX, streamflow Gages).

(2) **Runoff plus Undesignated Inflows, DeKalb Gage to Index Gage:** Fifty (50) percent of (Index Gage flow, minus DeKalb Gage flow, plus Oklahoma, Texas and Arkansas diversions downstream from DeKalb Gage).

(3) **Runoff plus Undesignated Inflows, Sulphur River Gage:** One hundred percent of (Sulphur River near Texarkana Gage flow) minus (Texas diversions from river below gage) plus (Texas diversions below Texarkana Dam).

(4) **Runoff Only, Denison Dam to Index Gage:** Fifty percent of (Index Gage flow, minus Red River at Denison Dam Gage flow, plus Oklahoma and Texas and Ar-

kansas diversions upstream from the Index Gage, minus Blue River near Blue, OK, Gage flow, minus Muddy Boggy Creek near Unger-Okla. Gage flow, minus Kiamichi River near Hugo-Okla. flow, minus Sanders Creek near Chicota-Texas Gage flow).

c. **Arkansas Runoff plus Undesignated Inflows.**

(1) **Oklahoma-Arkansas State Line to Index Gage:** Thirty-four and one-half (34.5) percent of (Index Gage flow, minus DeKalb Gage flow, plus Oklahoma and Texas and Arkansas diversions between DeKalb and Index Gages).

(2) **Index Gage to Hosston, Gage:**

(a) Hosston Gage flow, plus Louisiana diversions above Hosston Gage, minus Index Gage flow, minus (Sulphur River near Texarkana Gage flow less Texas diversions from river below gage), plus Arkansas diversions downstream from Index Gage.

d. **Louisiana Streamflow at Arkansas-Louisiana State Boundary.**

(1) **Red River flow at Arkansas-Louisiana State boundary** equals (Gage flow) plus (Louisiana diversions from Red River downstream from the State boundary and upstream from gage.)

(2) **Data needed to make interim Louisiana calculations**

(a) **For Red River flows up to 5,000 cfs** - Hosston Gage flow, plus Louisiana diversions from Red River upstream from Hosston Gage.

(b) **For Red River flows of 5,000 cfs or larger** - Shreveport Gage flow, plus Louisiana diversions from Red River upstream from Shreveport Gage, minus Twelvemile Bayou near Dixie-La Gage flow, plus Louisiana diversions from Twelvemile Bayou below Twelvemile Bayou near Dixie-La Gage.

(3) **Effect of Flow Trends, Scheduled Change of Reservoir Releases, and Other Events Certain to Significantly Change Flow at Arkansas-Louisiana State Boundary During Coming Week.** In addition to the Arkansas-Louisiana State boundary flow estimated based on subparagraph (2) (a) or (b) above, the EAC will also advise the Commission of probable significant changes in State boundary flow which should result from flow trends, scheduled change of reservoir releases, and other such known events.

7. **Procedures (Using Designated Flow Data) to Compute State Runoff plus Undesignated Inflows and Flow of Red River at Arkansas-Louisiana State boundary.** Procedures outlined in paragraph 6 above will be followed except that designated inflows, designated

outflows and diversion of designated flows will be accounted for whenever appropriate.

Public Law No. 87-874
87th Congress, H. R. 13273
October 23, 1962

TITLE I—RIVERS AND HARBORS

SEC. 101. That the following works of improvement of rivers and harbors and other waterways for navigation, flood control, and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of the Army and supervision of the Chief of Engineers, in accordance with the plans and subject to the conditions recommended by the Chief of Engineers in the respective reports hereinafter designated:

* * *

RED RIVER BASIN

That the general plan for flood control and other purposes on Red River below Denison Dam is hereby modified to authorize the Chief of Engineers to adjust the local cooperation requirements of the McKinney Bayou, Arkansas and Texas, Maniece Bayou, Arkansas, and East Point, Louisiana, projects so as to bring such requirements in accord with the recommendations of the Secretary of the Army and approval of the President, such adjustment to be made at the earliest practicable date.

The project for Sanders, Big Pine, and Collier Creeks, Texas, is hereby authorized substantially as recommended by the Chief of Engineers, at an estimated cost of $16,100,000, subject to the recommendations of the Secretary of the Army and approval of the President.

The project for Lake Kemp, Wichita River, Texas, is hereby authorized substantially in accordance with the recommendations of the Chief of Engineers

in Senate Document Numbered 144, Eighty-seventh Congress, at an estimated cost of $6,410,000.

The modification of the Broken Bow Reservoir, Mountain Fork River, Oklahoma, is hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in Senate Document Numbered 137, Eighty-seventh Congress, at an estimated cost of $23,800,000.

The project for the Clayton and Tuskahoma Reservoirs, Kiamichi River, Oklahoma, is hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in Senate Document Numbered 145, Eighty-seventh Congress, at an estimated cost of $29,748,000.

The project providing for the construction of two experimental water quality study projects in the Arkansas-Red River Basins, is hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in Senate Document Numbered 105, Eighty-seventh Congress, at an estimated cost of $300,000.

1977 Okla. Sess. Laws 1005:

WATER RESOURCES—COMPREHENSIVE PLAN

S. J. Res. No. 7

A JOINT RESOLUTION RELATING TO THE ALLOCATION OF OKLAHOMA'S WATER RESOURCES; AFFIRMING OKLAHOMA'S PRIORITY OVER A PORTION OF UNUSED AND UNCONTROLLED WATERS FLOWING FROM THE STATE; AND EXPRESSING LEGISLATIVE INTENT TO SUSTAIN SUCH CLAIM BY THE IMPLEMENTATION OF A STATEWIDE COMPREHENSIVE WATER PLAN.

WHEREAS, Article 16, Section 3, of the Constitution of the State of Oklahoma grants to the Legislature the power to provide for water resources development; and

WHEREAS, it is imperative that the State of Oklahoma protect the rights of all citizens to adequate supplies of water; and

WHEREAS, it is possible that by continuing to allow water to flow out of state, Oklahoma's legal title to such water might become questionable inasmuch as water must be placed at its best beneficial use in order to protect any rights thereto; and

WHEREAS, it is necessary to plan for earliest maximum utilization of all our water in order to preserve Oklahoma's right thereto; and

WHEREAS, the Legislature in 1957, under Senate Bill No. 138, established the Oklahoma Water Resources Board and mandated that the Board develop statewide and local plans to assure the most effective use of water for both the current and long range

needs of the people of Oklahoma and submit such plans for the consideration and approval of the Legislature; and

WHEREAS, the Legislature in 1974, under Senate Bill No. 510, authorized the Oklahoma Water Resources Board to prepare a. Comprehensive State Water Plan, including feasibility and cost studies on designated projects within the plan itself, for submission to the Legislature; and

WHEREAS, Phase I of the Oklahoma Comprehensive Water Plan shows a definite need for development of additional water supplies to meet the future needs of the state; and

WHEREAS, a statewide comprehensive water plan can only be developed and implemented if water within the state can be incontestably allocated at or prior to the time of implementation of the plan.

Now, Therefore, be it resolved by the Senate and the House of Representatives of the 1st Session of the 36th Oklahoma Legislature:

That the Oklahoma Legislature does hereby affirm a prior right for the State of Oklahoma over 10,250,000 acre feet annually of the unused and uncontrolled water flowing from the state or so much as may be necessary for the development and implementation of a statewide comprehensive water plan, such figure to be adjusted as necessary by the Oklahoma Water Resources Board.

BE IT FURTHER RESOLVED, that the Legislature hereby declares its intent to sustain the state's claim to such amount of water by the implementation and vitalization of a statewide comprehensive water plan.

Approved June 14, 1977.

2000 Okla. Sess. Laws 2608:

WATER RESOURCES BOARD—DIRECTING DEVELOPMENT OF SOUTHEASTERN OKLAHOMA WATER RESOURCES MANAGEMENT PLAN

H. C. Res. No. 1109

A Concurrent Resolution relating to the Oklahoma Water Resources Board; directing development of the Southeastern Oklahoma Water Resources Management Plan; providing criteria thereto; and directing distribution.

WHEREAS, the water resources of the Kiamichi River in Oklahoma are critical to the economic development and quality of life of southeastern Oklahoma; and

WHEREAS, efficient management of the Kiamichi River basin can serve the multiple purposes of flood control, water quality, environmental sustainability, water supply and economic development; and

WHEREAS, efficient allocation of water from the Kiamichi River basin can achieve such multiple purposes and serve to support new wastewater and water treatment facilities within southeastern Oklahoma, water supplies outside the Kiamichi basin, and address federal debt repayment issues; and

WHEREAS, federal legislation has been introduced to assist the State of Oklahoma, the Choctaw and Chickasaw Nations and the communities surrounding the Kiamichi River basin in determining an allocation method that will achieve the multiple purposes specified; and

WHEREAS, such federal legislation requires development of a water resources management plan for the Kiamichi River basin.

NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE 2ND SESSION OF THE 47TH OKLAHOMA LEGISLATURE, THE SENATE CONCURRING THEREIN:

THAT the Oklahoma Legislature supports and directs the development of the Southeastern Oklahoma Water Resources Management Plan for the Kiamichi River basin.

THAT the Southeastern Oklahoma Water Resources Management Plan shall identify necessary sustainable long-tern water supplies within the basin for flood control, environmental, and water supply purposes, excess water available for export and sale, and potential uses of revenue from such excess water sales for the purposes of improving water quality and environmental conditions within the Kiamichi River basin.

THAT the Oklahoma Legislature hereby directs the Oklahoma Water Resources Board, in conjunction with the United States Army Corps of Engineers, Tulsa District, to study the above-stated issues, and to develop the Southeastern Oklahoma Water Resources Management Plan so as to efficiently utilize the water supplies of the Kiamichi River for the benefit of the Kiamichi River basin region and adjacent regions in the state.

THAT the study shall be conducted in compliance with the provisions of Sections 1 and 2 of Enrolled House Concurrent Resolution 1066 of the 1st Session of the 47th Oklahoma Legislature, and recommendations from the Kiamichi River Basin

Water Resources Development Plan, previously prepared by the Oklahoma Water Resources Board.

THAT the Oklahoma Water Resources Board shall accept proposals for the development of the Kiamichi River Basin, which proposals shall be nonbinding on the state, and shall include a schedule of implementation such that the 1st Session of the 48th Oklahoma Legislature may consider acting upon recommendations from the Oklahoma Water Resources Board. Any such proposals shall contain criteria consistent with all principles established by the Kiamichi River Basin Water Resources Development Plan.

THAT copies of this resolution shall be distributed to the United States Army Corps of Engineers, Tulsa District and the Oklahoma Water Resources Board.

Adopted by the House of Representatives the 23rd day of May, 2000.

Adopted by the Senate the 26th day of May, 2000.

Filed with the Secretary of State May 26, 2000.

2002 Okla. Sess. Laws, ch. 485:

WATERS AND WATER RIGHTS—STATE GOVERNMENT—JOINT COMMITTEE ON STATE-TRIBAL RELATIONS—MORATORIUM ON SALE OR EXPORTATION OF WATER OUTSIDE STATE—JOINT COMMITTEE ON WATER PLANNING

CHAPTER 485

S.B. No. 1410

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1B of Title 82, unless there is created a duplication in numbering, reads as follows:

A. In order to provide for the conservation, preservation, protection and optimum development and utilization of surface water and groundwater within Oklahoma, the Legislature hereby establishes a moratorium on the sale or exportation of surface water and/or groundwater outside this state pursuant to the provisions of this section for a three-year period beginning on the effective date of this act, unless earlier repealed or revoked by the Oklahoma Legislature.

B. Subject to the moratorium set by subsection A of this section, no state agency, authority, board, commission, committee, department, trust or other instrumentality of this state or political subdivision thereof, nor elected or appointed officer, member of any governing body or other person designated to act for an agency or on behalf of the state, or a political subdivision thereof shall contract for the sale or exportation of surface water or groundwater outside

the state, or sell or export. surface water or groundwater outside the state without the consent of the Oklahoma Legislature specifically authorizing such sale or export of water.

C. Nothing in this section shall be construed as affecting or intending to affect:

1. Any contract for the sale or exportation of surface water or groundwater outside the state executed prior to the effective date of this act which has received legislative approval or was executed pursuant to law, provided such sale or exportation of surface water or groundwater does not exceed eight million (8,000,000) gallons of water per month; or

2. Water contained in agricultural crops, animal and dairy products, beverages, or processed or manufactured products or to products transported in cans, bottles, packages, kegs, or barrels.

* * *

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1221.A of Title 74, unless there is created a duplication in numbering, reads as follows:

In order to provide for the conservation, preservation, protection and optimum development and utilization of surface water and groundwater within this state, the Legislature hereby establishes a moratorium on any state or tribal compact or any intergovernmental cooperative agreement, authorized pursuant to law, which is drafted in whole or in part to apportion surface water or groundwater ownership, or authorize or otherwise implement any sale or exportation of surface water or groundwater outside this state, except as authorized by the provisions of this act. Such moratorium shall begin on the effec-

tive date of this act and remain in effect for a three-year period unless earlier repealed or revoked by the Legislature.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1C of Title 82, unless there is created a duplication in numbering, reads as follows:

A. There is hereby created the Joint Committee on Water Planning.

B. The purpose of the Committee shall be to study, investigate, examine and analyze issues relating to a comprehensive statewide water study and plan, and to consider and make recommendations to the Legislature regarding:

1. Principles in developing a public policy for protection, management, conservation, development and utilization of water resources of this state;

2. The existing conditions concerning waters of the state and its uses for all purposes within the State of Oklahoma;

3. The infrastructure needs of Oklahoma's communities;

4. The long-term sustainability of Oklahoma's water supply;

5. The methods for developing, managing, protecting and conserving water resources of the state but which allow for economic growth and development;

6. Review beneficial uses of water which reflect the public interest of the entire state while protecting the property rights of Oklahoma citizens. When reviewing beneficial uses of water, due consideration shall be given to alternatives which allow maximum

sustainable growth in Oklahoma while protecting all designated beneficial uses of water, promoting conservation and prudent use, prioritizing public health and welfare considerations, protecting the rights of citizens and the water rights of Oklahoma citizens, in particular the water rights of the citizens in the basins of origin, protecting natural ecosystems, and encouraging methods for voluntary redistribution of excess or surplus water to Oklahoma regions and citizens with inadequate supplies;

7. The state and federal statutory and case law which may impact the development, management, conservation and use of Oklahoma water;

8. Regional or statewide systems for the orderly development, management, conservation and use of water resources of the entire state. For this purpose, the Committee shall recommend either the creation of regional plans or a statewide plan;

9. Various water management strategies including: improved conservation, reuse and management of existing water supplies, acquisition of available existing water supplies, development of new water supplies, and preparation for and response to drought conditions in order that sufficient water at the highest quality possible will be available at a reasonable cost to Oklahoma residents to ensure public health, safety and welfare, further economic development and to protect the agricultural, recreational and natural resources;

10. Cooperative arrangements with other states;

11. The definition of "excess and surplus water of this state" including water quality and water quantity. In determining the definition of excess and surplus water of the state, the Committee shall be

guided by the principles and policies regarding the waters of this state enumerated in the Oklahoma Statutes including, but not limited to, Section 1084.1 of Title 82 of the Oklahoma Statutes;

12. The process for determining "excess and surplus" water;

13. The out-of-basin and out-of-state water sales and/or transfers;

14. Potential local, state, and federal funding sources for development of a comprehensive statewide water study and plan;

15. The advice of representatives of the United States Army Corps of Engineers, the Bureau of Reclamation, the Natural Resources Conservation Service, United States Geological Survey, United States Fish and Wildlife Service, and other appropriate federal agencies, as well as representatives of state agencies involved in tourism, environmental quality, parks, fish and wildlife, recreation, conservation, public health, agriculture, public utilities and industrial development;

16. The review of water usage in this state;

17. Uniform data regarding the collection, analysis, interpretation and use of information on water quality and water quantity data; and

18. Such other areas concerning state water resources as deemed necessary by the Committee.

C. The Committee shall be composed of nineteen (19) legislative members as follows: seven members of the Oklahoma House of Representatives shall be appointed by the Speaker of the House of Representatives, seven members of the Oklahoma Senate shall be appointed by the President Pro Tempore of the

Senate, and five legislative members appointed by the Governor.

D. Members shall be appointed after the 1st day of the 1st Session of the 49th Oklahoma Legislature and no later than the last day of February 2003. The Speaker of the House of Representatives and the President Pro Tempore of the Senate shall each designate a legislative member to serve as cochair of the Committee. The cochairs of the Committee shall convene a meeting of the Committee within thirty (30) days of the effective date of the appointments. The membership of the Committee shall determine a meeting schedule by majority approval of the Committee. A majority of the members present at a meeting shall constitute a quorum. All meetings of the Committee shall be open to the public and shall be held in accordance with the Oklahoma Open Meeting Act.

E. The Committee shall be staffed by the staff of the Oklahoma House of Representatives and the Oklahoma State Senate and by any other state agency staff as deemed necessary by the Committee.

F. The work of the Committee shall be finalized no later than January 15, 2005, and any written recommendations of the Committee shall be made available to the public and delivered to each member of the Oklahoma Legislature by February 1, 2005.

G. The cochairs of the Committee may appoint subcommittees as deemed necessary from the members of the Committee for the purpose of carrying out its duties pursuant to the provisions of this section.

H. Legislative members of the Committee shall receive reimbursement from the house in which they

serve pursuant to Section 456 of Title 74 of the Oklahoma Statutes.

SECTION 5. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

Approved June 6, 2002.

2004 Okla. Sess. Laws, ch. 392, § 1:

WATERS AND WATER RIGHTS—SALE OR EXPORTATION OF WATERS

CHAPTER 392

H.B. No. 2440

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY Section 1, Chapter 485, O.S.L. 2002 (82 O.S. Supp. 2003, Section 1B), is amended to read as follows:

Section 1B. A. In order to provide for the conservation, preservation, protection and optimum development and utilization of surface water and groundwater within Oklahoma, the Legislature hereby establishes a moratorium on the sale or exportation of surface water and/or groundwater outside this state pursuant to the provisions of this section ~~for a three-year period beginning on the effective date of this act, unless earlier~~. Unless otherwise repealed or revoked by the Oklahoma Legislature, the moratorium shall be in effect for a five-year period beginning on the effective date of this act or until such time as the State of Oklahoma conducts and completes a comprehensive scientific hydrological study of the water resources of this state.

B. Subject to the moratorium set by subsection A of this section, no state agency, authority, board, commission, committee, department, trust or other instrumentality of this state or political subdivision thereof, nor elected or appointed officer, member of any governing body or other person designated to act for an agency or on behalf of the state, or a political subdivision thereof shall contract for the sale or exportation of surface water or groundwater outside

the state, or sell or export surface water or groundwater outside the state without the consent of the Oklahoma Legislature specifically authorizing such sale or export of water.

C. Nothing in this section shall be construed as affecting or intending to affect:

1. Any contract for the sale or exportation of surface water or groundwater outside the state executed prior to the effective date of this act which has received legislative approval or was executed pursuant to law, provided such sale or exportation of surface water or groundwater does not exceed eight million (8,000,000) gallons of water per month; or

2. Water contained in agricultural crops, animal and dairy products, beverages, or processed or manufactured products or to products transported in cans, bottles, packages, kegs, or barrels.

* * *

Approved June 3, 2004.

2007 Okla. Sess. Laws, ch. 93, § 16:

GOVERNMENTAL ENTITIES

CHAPTER 93

H.B. No. 2111

An Act relating to governmental entities; modifying and repealing sections related to unnecessary governmental entities; * * * repealing Section 4, Chapter 485, O.S.L. 2002 (82 O.S. Supp. 2006, Section 1C), which relates to the Joint Committee on Water Planning * * *.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

* * *

SECTION 16. REPEALER Section 4, Chapter 485, O.S.L. 2002 (82 O.S. Supp. 2006, Section 1C) [see pp. 76-80, *supra*], is hereby repealed.

* * *

Approved May 4, 2007.

2009 Okla. Sess. Laws, ch. 403:

WATER AND WATER RIGHTS—APPROVAL OF APPLICATIONS FOR STREAM WATER USE

CHAPTER 403

H.B. No. 1483

An Act relating to water and water rights; making statement of certain recognition; prohibiting issuance of certain permits by the Oklahoma Water Resources Board that would impair certain abilities and powers; making certain waters apportioned by an interstate compact subject to certain rights and powers of the state; prohibiting a permit authorizing certain use of certain water without legislative authorization; amending 82 O.S. 2001, Section 105.12, which relates to approval of applications for stream water use; adding certain requirement; listing additional matter the Oklahoma Water Resources Board shall consider for out-of-state water use; clarifying certain review restrictions; requiring out-of-state water use applicant to designate an agent in-state; requiring the applicant to consent to certain conditions if there is a conflict; making out-of-state water use permits subject to certain review by the Board; allowing additional conditions; providing for application of certain provisions to certain water use applications; providing for codification; and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 105.12A of Title 82, unless there is created a duplication in numbering, reads as follows:

A. The State of Oklahoma has long recognized the importance of the conservation and preservation of its public waters and the necessity to maintain adequate supplies for the present and future water requirements of the state and to protect the public welfare of its citizens, and has entered into interstate compacts for that purpose.

B. No permit issued by the Oklahoma Water Resources Board to use water outside the boundaries of the State of Oklahoma shall:

1. Impair the ability of the State of Oklahoma to meet its obligations under any interstate stream compact; or

2. Impair or affect the powers, rights, or obligations of the United States, or those claiming under its authority or law, in, over and to water apportioned by interstate compacts.

C. Water apportioned to the State of Oklahoma by an interstate compact is subject to the right and power of the State of Oklahoma to control, among other matters, the method of diversion of the water and the place of use.

D. No permit for the use of water out of state shall authorize use of water apportioned to the State of Oklahoma under an interstate compact unless specifically authorized by an act of the Oklahoma Legislature and thereafter as approved by it.

SECTION 2. AMENDATORY 82 O.S. 2001, Section 105.12, is amended to read as follows:

Section 105.12. A. ~~Before~~ In order to protect the public welfare of the citizens of Oklahoma and before the Oklahoma Water Resources Board takes final action on the application, the Board shall determine from the evidence presented whether:

1. There is unappropriated water available in the amount applied for;

2. The applicant has a present or future need for the water and the use to which applicant intends to put the water is a beneficial use. In making this determination, the Board shall consider the availability of all stream water sources and ~~such~~ other relevant matters as the Board deems appropriate, and may consider the availability of groundwater as an alternative source;

3. The proposed use does not interfere with domestic or existing appropriative uses; ~~and~~

4. If the application is for the transportation of water for use outside the stream system wherein the water originates, the proposed use must not interfere with existing or proposed beneficial uses within the stream system and the needs of the water users therein. In making this determination, the Board shall utilize the review conducted pursuant to subsection B of this section; and

5. If the application is for use of water out of state, the Board shall, in addition to the criteria set forth in this subsection, also evaluate whether the water that is the subject of the application could feasibly be transported to alleviate water shortages in the State of Oklahoma.

If ~~so~~ the evidence is determined to be sufficient, and subject to subsection B of this section, the Board shall approve the application by issuing a permit to

appropriate water. The permit shall state the time within which the water shall be applied to beneficial use. In the absence of appeal as provided by the Administrative Procedures Act, the decision of the Board shall be final.

B. 1. In the granting of water rights for the transportation of water for use outside the stream system wherein water originates, pending applications to use water within ~~such~~ the stream system shall first be considered in order to assure that applicants within ~~such~~ the stream system shall have all of the water required to adequately supply their beneficial uses.

2. The Board shall review the needs within ~~such~~ the area of origin every five (5) years to determine whether the water supply is adequate for municipal, industrial, domestic, and other beneficial uses.

C. The review conducted pursuant to paragraph 2 of subsection B of this section shall not be used to reduce the quantity of water authorized to be used pursuant to permits issued prior to such review. Such permits, however, remain subject to loss, in whole or in part, due to nonuse, forfeiture or abandonment, pursuant to this title.

D. On the filing of an application or amendment to use water outside the state, the applicant shall designate an agent in the State of Oklahoma for service of process and to receive other notices.

E. In the event of a conflict between the conditions of use required in Oklahoma and conditions required in another state, the water right holder shall consent to conditions imposed by the Board.

F. Permits and amendments that authorize the use of water outside the state shall be subject to re-

view by the Board at least every ten (10) years after the date of issuance to determine whether there has been a substantial or material change relating to any matters set forth in subsection A of this section. The Board may impose additional conditions as described by Board rules to address any such substantial or material change.

G. Notwithstanding the provisions of any other law that may be deemed inconsistent with this section, the Board shall promulgate rules and apply the provisions of Section 1 of this act and subsections A, B, D, E, and F of this section to applications for use of water for which no final adjudication has been made by the Oklahoma Water Resources Board before the effective date of this act.

SECTION 3. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

Approved June 1, 2009.

CURRENT OKLAHOMA STATUTES

Okla. Stat. tit. 74, § 1221.A. Moratorium on compacts or cooperative agreements relating to surface water or groundwater.

In order to provide for the conservation, preservation, protection and optimum development and utilization of surface water and groundwater within this state, the Legislature hereby establishes a moratorium on any state or tribal compact or any intergovernmental cooperative agreement, authorized pursuant to law, which is drafted in whole or in part to apportion surface water or groundwater ownership, or authorize or otherwise implement any sale or exportation of surface water or groundwater outside this state, except as authorized by the provisions of this act. Unless earlier repealed or revoked by the Legislature, the moratorium shall be in effect for a five-year period beginning on the effective date of this act or until such time as the State of Oklahoma conducts and completes a comprehensive scientific hydrological study of the water resources of this state.

Added by Laws 2002, c. 485, § 3, emerg. eff. June 6, 2002. Amended by Laws 2004, c. 392, § 2, eff. Nov. 1, 2004.

Okla. Stat. tit. 82, § 1B. Moratorium on sale or exportation of surface water and/or groundwater.

A. In order to provide for the conservation, preservation, protection and optimum development and utilization of surface water and groundwater within Oklahoma, the Legislature hereby establishes a moratorium on the sale or exportation of surface water and/or groundwater outside this state pursuant to the provisions of this section. Unless otherwise re-

pealed or revoked by the Oklahoma Legislature, the moratorium shall be in effect for a five-year period beginning on the effective date of this act or until such time as the State of Oklahoma conducts and completes a comprehensive scientific hydrological study of the water resources of this state.

B. Subject to the moratorium set by subsection A of this section, no state agency, authority, board, commission, committee, department, trust or other instrumentality of this state or political subdivision thereof, nor elected or appointed officer, member of any governing body or other person designated to act for an agency or on behalf of the state, or a political subdivision thereof shall contract for the sale or exportation of surface water or groundwater outside the state, or sell or export surface water or groundwater outside the state without the consent of the Oklahoma Legislature specifically authorizing such sale or export of water.

C. Nothing in this section shall be construed as affecting or intending to affect:

1. Any contract for the sale or exportation of surface water or groundwater outside the state executed prior to the effective date of this act which has received legislative approval or was executed pursuant to law, provided such sale or exportation of surface water or groundwater does not exceed eight million (8,000,000) gallons of water per month; or

2. Water contained in agricultural crops, animal and dairy products, beverages, or processed or manufactured products or to products transported in cans, bottles, packages, kegs, or barrels.

Added by Laws 2002, c. 485, § 1, emerg. eff. June 6, 2002. Amended by Laws 2004, c. 392, § 1, eff. Nov. 1, 2004.

§82-1C. Repealed by Laws 2007, c. 93, § 16, eff. Nov. 1, 2007.

Okla. Stat. tit. 82, §105.9. Application for water rights.

Any person, firm, corporation, state or federal governmental agency, or subdivision thereof, intending to acquire the right to the beneficial use of any water shall, before commencing any construction for such purposes or before taking the same from any constructed works, make an application to the Board, together with the filing fee authorized by law, for a permit to appropriate in the form required by rules and regulations established by the Board. Such rules and regulations shall, in addition to providing the form and manner of preparing and presenting the application, require that such application state all the data necessary for the proper description and limitation of the right applied for, as to the amount of water requested, together with such information as may be necessary to show the method and practicability of the construction and the ability of the applicant to complete the same.

Added by Laws 1972, c. 256, § 9.

Okla. Stat. tit. 82, §105.12. Approval of application by Oklahoma Water Resources Board – Use of water outside the state.

A. In order to protect the public welfare of the citizens of Oklahoma and before the Oklahoma Water Resources Board takes final action on the application, the Board shall determine from the evidence presented whether:

1. There is unappropriated water available in the amount applied for;

2. The applicant has a present or future need for the water and the use to which applicant intends to put the water is a beneficial use. In making this determination, the Board shall consider the availability of all stream water sources and other relevant matters as the Board deems appropriate, and may consider the availability of groundwater as an alternative source;

3. The proposed use does not interfere with domestic or existing appropriative uses;

4. If the application is for the transportation of water for use outside the stream system wherein the water originates, the proposed use must not interfere with existing or proposed beneficial uses within the stream system and the needs of the water users therein. In making this determination, the Board shall utilize the review conducted pursuant to subsection B of this section; and

5. If the application is for use of water out of state, the Board shall, in addition to the criteria set forth in this subsection, also evaluate whether the water that is the subject of the application could feasibly be transported to alleviate water shortages in the State of Oklahoma.

If the evidence is determined to be sufficient, and subject to subsection B of this section, the Board shall approve the application by issuing a permit to appropriate water. The permit shall state the time within which the water shall be applied to beneficial use. In the absence of appeal as provided by the Administrative Procedures Act, the decision of the Board shall be final.

B. 1. In the granting of water rights for the transportation of water for use outside the stream system wherein water originates, pending applications to use water within the stream system shall first be considered in order to assure that applicants within the stream system shall have all of the water required to adequately supply their beneficial uses.

2. The Board shall review the needs within the area of origin every five (5) years to determine whether the water supply is adequate for municipal, industrial, domestic, and other beneficial uses.

C. The review conducted pursuant to paragraph 2 of subsection B of this section shall not be used to reduce the quantity of water authorized to be used pursuant to permits issued prior to such review. Such permits, however, remain subject to loss, in whole or in part, due to nonuse, forfeiture or abandonment, pursuant to this title.

D. On the filing of an application or amendment to use water outside the state, the applicant shall designate an agent in the State of Oklahoma for service of process and to receive other notices.

E. In the event of a conflict between the conditions of use required in Oklahoma and conditions required in another state, the water right holder shall consent to conditions imposed by the Board.

F. Permits and amendments that authorize the use of water outside the state shall be subject to review by the Board at least every ten (10) years after the date of issuance to determine whether there has been a substantial or material change relating to any matters set forth in subsection A of this section. The Board may impose additional conditions as described

by Board rules to address any such substantial or material change.

G. Notwithstanding the provisions of any other law that may be deemed inconsistent with this section, the Board shall promulgate rules and apply the provisions of Section 1 of this act and subsections A, B, D, E, and F of this section to applications for use of water for which no final adjudication has been made by the Oklahoma Water Resources Board before the effective date of this act.

Added by Laws 1972, c. 256, § 12. Amended by Laws 1988, c. 203, § 3, emerg. eff. June 10, 1988; Laws 1993, c. 164, § 3, emerg. eff. May 10, 1993; Laws 2009, c. 403, § 2, emerg. eff. June 1, 2009.

Okla. Stat. tit. 82, §105.12A. Permits to use water outside of state.

A. The State of Oklahoma has long recognized the importance of the conservation and preservation of its public waters and the necessity to maintain adequate supplies for the present and future water requirements of the state and to protect the public welfare of its citizens, and has entered into interstate compacts for that purpose.

B. No permit issued by the Oklahoma Water Resources Board to use water outside the boundaries of the State of Oklahoma shall:

1. Impair the ability of the State of Oklahoma to meet its obligations under any interstate stream compact; or

2. Impair or affect the powers, rights, or obligations of the United States, or those claiming under its authority or law, in, over and to water apportioned by interstate compacts.

C. Water apportioned to the State of Oklahoma by an interstate compact is subject to the right and power of the State of Oklahoma to control, among other matters, the method of diversion of the water and the place of use.

D. No permit for the use of water out of state shall authorize use of water apportioned to the State of Oklahoma under an interstate compact unless specifically authorized by an act of the Oklahoma Legislature and thereafter as approved by it.

Added by Laws 2009, c. 403, § 1, emerg. eff. June 1, 2009.

Okla. Stat. tit. 82, §105.16. Time for putting water to beneficial use.

A. Unless a schedule of use is provided by the Board as authorized in this section, a regular permit shall require that the whole of the amount of the water authorized by the permit be put to beneficial use within a period of less than seven (7) years.

B. If, upon evidence presented to the Board, and considering the present and future needs of the stream system of origin, it appears that the proposed project, improvement or structure will promote the optimal beneficial use of water in the state, and it further appears that the total amount of water to be authorized by the permit cannot be put to beneficial use within seven (7) years, then the Board shall provide in the permit the time within which the total amount to be authorized shall be put to beneficial use. This time shall be the useful life of the proposed project, improvement or structure as found by the Board. In order to insure orderly progress toward total beneficial utilization within the said time set by

the Board, the Board shall provide in the permit a schedule of times within which certain percentages of the total amount to be authorized must be put to beneficial use.

C. Nothing in this act shall be deemed to reestablish any right to the use of any water which has been lost by failure to use same or by forfeiture prior to July 5, 1961.

Laws 1972, c. 256, § 16; Laws 1993, c. 164, § 5, emerg. eff. May 10, 1993.

Okla. Stat. tit. 82, §1085.2. Authority of Oklahoma Water Resources Board.

In addition to any and all other authority conferred upon it by law, the Oklahoma Water Resources Board shall also have authority:

* * *

2. To make such contracts and execute such instruments as in the judgment of the Board are necessary or convenient to the exercise of any of the powers conferred upon it by law. Provided, however, no contract shall be made conveying the title or use of any waters of the State of Oklahoma to any person, firm, corporation or other state or subdivision of government, for sale or use in any other state, unless such contract be specifically authorized by an act of the Oklahoma Legislature and thereafter as approved by it[.]

Okla. Stat. tit. 82, §1086.1. Policy of state as to use of surplus and excess water - State water plan.

A. All of the people have a primary interest in the orderly and coordinated control, protection, man-

agement, conservation, development and utilization of the water resources of the state. The people residing within areas where waters originate benefit from the optimum development and utilization of water within the area of origin. The people in water deficient areas benefit by being able to use excess and surplus waters. The policy of the State of Oklahoma is to encourage the use of surplus and excess water to the extent that the use thereof is not required by people residing within the area where such water originates. In order to maximize the alternatives available for the use and benefit of the public and water-user entities and for the use and benefit of the public and for the general welfare and future economic growth of the state, it is therefore the purpose of this act to provide means for the expeditious and coordinated preparation of a comprehensive state water plan and decennial updates thereof for submission to the Legislature providing for the management, protection, conservation, structural and nonstructural development and utilization of water resources of this state, in accordance with the following principles:

* * *

3. Water use within Oklahoma should be developed to the maximum extent feasible for the benefit of Oklahoma so that out-of-state downstream users will not acquire vested rights therein to the detriment of the citizens of this state[.]

Okla. Stat. tit. 82, §1086.2. Powers of Oklahoma Water Resources Board.

For the purpose of effectuating the provisions of this act and the policy established in Section 1086.1

of this title, the Oklahoma Water Resources Board is hereby authorized, empowered and directed:

1. To prepare a comprehensive state water plan and decennial updates thereof for submission to the Legislature and, in connection therewith, to conduct surveys and cooperate with other state and federal agencies. Such comprehensive state water plan and the parts and portions thereof shall be submitted in final and completed form not later than September 1, 1975, and, in addition to the foregoing requirements, shall include a definition of "excess and surplus water of this state" and a recommended procedure for determining "excess and surplus water of this state," which definition and procedure are to be developed to insure that the area of origin will never be made water deficient.

2. To adopt such rules and regulations as may be necessary to effectuate the purposes of this act.

3. To make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act.

Okla. Stat. tit. 82, §1266. Definitions.

In this act unless the context otherwise requires:

* * *

9. "Public agency" shall be as defined in the Interlocal Cooperation Act, Section 1003 of Title 74 of the Oklahoma Statutes, except public agencies of other states shall not be entitled to membership in the district[.]

Okla. Stat. tit. 82, §1324.10. Powers of district.

* * *

B. No district organized hereunder shall sell or export water or gas pursuant to the Rural Water, Sewer, Gas and Solid Waste Management Districts Act outside of the state without consent of the Legislature.

TRANSCRIPT OF PUBLIC HEARING PRELIMINARY EXAMINATION REPORT ON HUGO RESERVOIR & SUBSTITUTE RESERVOIRS KIAMICHI RIVER AND TRIBUTARIES, OKLAHOMA RED RIVER BASIN

HELD AT HUGO, OKLAHOMA

SEPTEMBER 4, 1956

* * *

[Tr. 8] MR. FOWLER WHITE (Mayor, Hugo, Oklahoma): Ladies and gentlemen, I am proud to see such a large attendance on the issue for discussion today. It is important to us of Hugo and Choctaw Counties, the things that are represented here today, and I am sure we will all receive a great benefit from it.

We have with us this afternoon the distinguished gentlemen from the Congress of the United States who represent us in this matter and represent us in Washington. We have Senator Robert S. Kerr, Honorable Speaker at the convention. The last time I saw him was on television. We are very glad to have you today. We have Senator Monroney, and in the center is Carl Albert.

This is Colonel Bristor. I don't want to leave him out because he is the most important when it gets to building it. Thank you.

COLONEL BRISTOR: Thank you, Mayor White. Going on with the hearing, we have Mr. Frank Davis, representing the City of Forth Worth, Texas.

MR. J. FRANK DAVIS (City Manager, Forth Worth, Texas): Senator Monroney, Senator Kerr, Congressman Albert, Colonel Bristor, ladies and gen-

tlemen. I am J. Frank Davis, City Manager for the City of Fort Worth. I would like to introduce to you a member of our council who is here today who is also a landowner in Oklahoma, Mr. Barney B. Holland. He comes from Forth Worth and also owns land along the Red River in Idabel, Oklahoma.

Fort Worth is interested in municipal water. That is our interest today. We are appreciative of the opportunity to be here. With the Colonel's permission, I would like for Mr. Freese, Consulting Engineer for the City of Fort Worth, to give you the details.

COLONEL BRISTOR: Thank you. Go ahead, Mr. Freese.

MR. S. W. FREESE (Consulting Engineer, City of Fort Worth, Texas): Senator Kerr, Colonel Bristor, ladies and gentlemen. Mr. Stephens, the water superintendent at Fort Worth, has transmitted to Colonel Bristor a letter from Mr. Davis, which I would like to read in part:

> "In order to plan an adequate water supply for our rapidly growing city and the industrial area of Tarrant County we employed the Consulting
>
> [Tr. 9] Engineering firm of Freese and Nichols of Fort Worth to make a detail study and comprehensive report on a water supply adequate to meet the demands of the area through the year 2000. This study is now almost complete and we expect to receive the final report by the end of this year."

The City of Fort Worth and Tarrant County would like to obtain a firm yield of somewhere in the neighborhood of 300 million gallons a day from the

streams in southeastern Oklahoma. Now we see the Boswell site first for this reason: that it is much nearer, or some nearer to Fort Worth. In obtaining some 300 million gallons per day, it would be more economical to build probably two 78-inch pipelines the distance from the Hugo site, as compared to the Boswell site, which is some 17½ or 18 miles, which would cost in pipelines an additional 14 or 15 million dollars. For that reason, of course, we are interested in the nearer sites.

The City of Fort Worth and Tarrant County recognizes the fact that first priority should be given to all the water needs of Oklahoma an they would—if there is any surplus water above the needs of Oklahoma—like to obtain the necessary storage rights from the Army Engineers. They would like to obtain the water rights from the State of Oklahoma and also the right to build pipelines or to secure pipelines from the reservoirs to the Texas line.

As to the Hugo site, it is recognized that Oklahoma City has already filed for certain rights above the Hugo site and also, in obtaining a firm yield from any reservoir, it is necessary that we figure on a certain reserve being left in the reservoir at the end of the worst drought period of record. We in Texas begin to get panicky when our reserves are drawn down to a two-year supply, but by reason of the steady flow of streams up here, we think a six months' reserve would be adequate to take care of worse drought periods than ones which occurred in the past.

Three hundred million gallons would be some 330 acre-feet per annum, so we would desire a reserve of 365,000 acre-feet in addition to the 300 million gallons a day per year. We doubt, when you take

care of the needs of Oklahoma, that there would be that much available in the Hugo site. We would expect to pay for that storage, and as I understood you

[Tr. 10] to say, Colonel Bristor, under the law under which you operate the city would be expected to pay the additional cost to provide the storage required. For example, if the water were obtained from either the Hugo site or the Boswell site or from any of the reservoirs further east, we would expect to provide storage capacity which would not be supplied in the absence of the demand that we might wish you to satisfy. In other words, supposing that all the requirements of Oklahoma, Oklahoma City, and all of this area which is expected to develop, that we could expect only to provide conservation storage which would not be otherwise taken up or provided for the needs of Oklahoma. In other words, if the Boswell site, for example, was planned to go ahead with a certain amount of flood control storage and to provide some conservation storage, we would only expect to ask for the right to provide for conservation storage meeting our requirements in addition to that previously planned, and we would expect to pay the cost, and we would also wish to obtain from the State of Oklahoma the necessary water rights for the development of that site which would not otherwise be developed in the absence of our paying for that conservation storage. Thank you.

Exhibit No. 3 - Letter from City of Fort Worth, Texas, August 23, 1956, signed by J. F. Davis, City Manager.

COLONEL BRISTOR: Are there representatives of any other municipality who wish to speak at this time? If not, we have certain civic groups. First, I

should like to call upon Mr. Guy Treat of the Oklahoma City Chamber of Commerce.

MR. GUY B. TREAT (Oklahoma City Chamber of Commerce, Oklahoma City, Oklahoma): Colonel Bristor, ladies and gentlemen. The Corps of Engineers has given this matter—as Senator Kerr puts it, "Land, Wood, and water"—a great deal of study. They have arrived at this conclusion: that if the water resources of the state are applied within the state we could reasonably expect the population of probably at least five million people, and the water which actually falls in Oklahoma and runs off would provide enough water for that population, together with a rate of industrial development. Approximately some 12 to 14 million acre-feet of water leaves the southeastern corner of the state through the Red River and Little River, the Kiamichi, and the Boggies. The Boggies probably contribute a third of that, the Kiamichi slightly less than a third, and Red River slightly more than a third.

* * *

[Tr. 13] ROBERT S. KERR (United State Senate, Washington, D. C.): Thank you very much, Colonel Bristor, Senator Monroney, Congressman Albert, representatives of the Corps, my friends in southeastern Oklahoma, and a hearty welcome to our good friends from across the Red River from Texas. We are certainly glad that they are here. We are glad our friends are here from Oklahoma City.

We regard this as one of the important meetings that we have had the opportunity to attend. It indicates the growing realization on the part of the people of this area of the tremendous value—of the tremendous available supply—of unpolluted, fresh,

high-quality water arising or originating in and flowing out of southeastern Oklahoma.

* * *

[Tr. 18] My position is that the waters should be impounded on the basis that meets the wishes of the people of the area. That is Number 1.

Number 2, that reservoirs be designed consistent with that principle, so as to completely conserve the waters that fall on this great watershed.

Number 3, that they be used first to meet the needs of the people in the area where the waters fall and where they are impounded.

Number 4, that they be used to meet the needs of the people of Oklahoma, who can secure the means or facilities by which those waters can be transferred to other people and other organizations and other municipalities within the State of Oklahoma, and, then, to the extent that additional water is available, certainly we would welcome the participation of people beyond our boundaries. We might have a little clearer concept than that as to their participation in paying for that impounding of water. It just might be that we would say, "Let them pay a little more", don't you know? We would not be adverse to that.

But I want to say this to you; that, in my judgment, there in an abundance of water. As Guy Treat told you, between 12 and 14 million acre-feet a year leave southeastern Oklahoma. That is about 12 billion gallons a day, Colonel, if my mathematics are not at fault, and if they are, I should like to be corrected before I leave this present party. About 12 billion gallons a day!

Oklahoma City today uses an average of 50 million gallons a day, so that one billion gallons is enough for 20 additional municipalities requiring what Oklahoma City now requires. I personally think that Oklahoma, southeastern and central Oklahoma, should reserve not less than 2½ to 3 billion gallons per day of that water. But there would still be 9 or 10 billion gallons a day of water.

* * *

[Tr. 21] . . . the Engineers can take into account the economic value of the storage space of water against future demand. When that is available to them, in addition to the economic elements of flood control, navigation, irrigation and power development, every project in southeastern Oklahoma can be economically justified, and will be, and will be built. And communities both here and within central Oklahoma, and, yes, there in north Texas, will be knocking at the doors of the Army Engineers and of those able to supply that water, standing in line with the money in their hands, or the contract of purchase in their hands, saying, "We are ready to help provide economic justification and economic compensation for these reservoirs."

* * *

[Tr. 35] MR. K. F. HOEFLE (Consulting Engineer, Forrest & Cotton, Dallas, Texas): Colonel Bristor, ladies and gentlemen, I represent the consulting firm of Forrest and Cotton and the City of Dallas who has commissioned the firm of Forrest and Cotton to look into their water situation for the next fifty years. That study has not been completed yet, but we know now that the total amount of water for Dallas and Dallas County will be in the neighborhood of five million gallons a day. We know what the value of

water is - not for future purposes, but for existing purposes and existing needs.

If a friendly foreigner from below the Red River could give advice to Oklahoma, I would do just what you are doing. I would look for the most conservation storage that can be provided in the entire drainage area.

The economy of any country is dependent on its water supply. You are not going to get people or industry to use water unless water is water stored in lakes and not in plans. It has to be done in advance of the uses which you expect to make of it.

After you have done that, and if you find that Oklahoma has a surplus of water to its needs and can safely export water to anyone else, Dallas would like to have the opportunity of negotiating for some of that surplus water. Thank you.

Senate Document No. 145, 87th Congress, 2d Session, September 24, 1962

HUGO RESERVOIR, KIAMICHI RIVER, OKLAHOMA

LETTER

FROM

THE SECRETARY OF THE ARMY

TRANSMITTING A LETTER FROM THE CHIEF OF ENGINEERS, DEPARTMENT OF THE ARMY, DATED AUGUST 24, 1962, SUBMITTING A FAVORABLE REPORT, TOGETHER WITH ACCOMPANYING PAPERS AND ILLUSTRATIONS, ON A REVIEW OF THE REPORTS ON THE HUGO RESERVOIR, KIAMICHI RIVER, OKLAHOMA, REQUESTED BY A RESOLUTION OF THE COMMITTEE ON PUBLIC WORKS, UNITED STATES SENATE, ADOPTED ON JANUARY 28, 1955

* * *

5. ECONOMIC DEVELOPMENT

a. Population. The Kiamichi River Basin has a population of 22,700 people, according to the 1960 census. The principal towns and their 1960 populations in or largely in the basin are Hugo, 6,287, Antlers, 2,085, and Talihina, 1,048. There has been a general decline in population in the basin since 1910. From 1950 to 1960, the decline amounted to about 21 percent, on an average, for the seven-county area comprising the basin and including adjacent area in these counties (but outside the watershed boundary).

This decline is in contrast to the general upward trend in population in the adjacent metropolitan areas, such as Oklahoma City, Oklahoma, Dallas and Fort Worth, Texas, and Shreveport, Louisiana.

b. Industry and resources:

* * *

(2) Industrial development in the region outside the Kiamichi River Basin is largely concentrated in central Oklahoma and north Texas cities. These industries include the processing of petroleum and related products, iron and steel products, fertilizers, and food processing. Water supplies for the urban and industrial development in the region are becoming inadequate. The Kiamichi River Basin offers an excellent potential source of future water supply for the central Oklahoma-north Texas region.

c. Economic projections and future population growth.

* * *

Supplement A to this report presents additional information and details on population, industry, resources, and trends with respect thereto. This supplementary information covers the Kiamichi River Basin, related portions of the Red River Basin, and other possible Kiamichi River Basin water supply demand areas, with special attention given to Oklahoma City, Oklahoma, and Dallas-Fort Worth, Texas, metropolitan areas.

* * *

15. IMPROVEMENTS DESIRED

a. A public hearing was held at Hugo, Oklahoma, on September 4, 1956, in connection with the study.

* * *

Representatives of Oklahoma City and smaller cities of Oklahoma, and Fort Worth and Dallas, Texas, expressed interest in obtaining future water supplies from the Kiamichi Basin.

* * *

The Cities of Dallas and Fort Worth, Texas, have stated they anticipate a future need for water from southeast Oklahoma, possibly from the Kiamichi River Basin.

(2) A 1958 report by the Bureau of Water Resources Research of the University of Oklahoma (presented at a public hearing held at Ada, Oklahoma, on November 18, 1958, on a related study) shows an estimated potential need for 1,000 million gallons per day (mgd) of additional water in the southeast and central Oklahoma areas by the year 2000, and 1,750 mgd by the year 2025, including needs for irrigation.

(3) The U. S. Public Health Service, in cooperation with the Corps of Engineers, has prepared a report on the municipal and industrial water requirements in the Kiamichi River Basin. Their report, dated December 1960 (presented in appendix IV), shows a potential need of 332 mgd of additional water from the Kiamichi River Basin by year 2010, of which 297 mgd would be for the Oklahoma City metropolitan area and 35 mgd for the area adjacent to the proposed reservoir. Projections for the Dallas-Fort Worth area indicate that development of all sources in the Trinity Valley and adjacent Texas watersheds will provide for their growing water demands until about the year 2000. Cost comparisons indicate that the additional water supply needed

there after the year 2000 could be obtained more advantageously from sources other than Kiamichi River projects. The Public Health Service report recommends construction of three reservoirs at different time stages to yield 35 mgd from Hugo Reservoir in 1965, 160 mgd from Clayton in 1980, and 200 mgd from Tuskahoma Reservoir in 2000. Information on a later study of regional water supply needs by the Public Health Service indicates a possible municipal and industrial need for 49 mgd from Hugo Reservoir by 2010.

* * *

17. PROJECT FORMULATION

a. Basic objectives. Hugo Reservoir was authorized to function 25 a unit for flood control of the Red River below Denison Dam. In the formulation of a plan for modifying Hugo Reservoir for flood control, water conservation and related uses, each new project or group of projects was studied with the objective of integrating it into the authorized Red River system. Under this concept, the plan should provide maximum reduction of flood stages on the Kiamichi and Red Rivers at least comparable to those afforded by the project as now authorized. Also, it was concluded that each project should be considered for its maximum economic capability for meeting the immediate and future needs of the area, anticipating continued economic growth beyond year 2010.

SUPPLEMENTAL ECONOMIC DATA HUGO RESERVOIR, KIAMICHI RIVER, OKLAHOMA

* * *

2. SUMMARY OF FINDINGS

The economic base which now serves as support for the current population of the seven-county area is unbalanced.

* * *

The metropolitan centers of Oklahoma City, Dallas, and Fort Worth, northwest and southeast, respectively, of the Kiamichi River Basin, are going to need additional water supplies to sustain the anticipated growth. Therefore, the reservoirs in the Kiamichi River Basin could provide the water supply for these metropolitan areas.

* * *

6. PHYSICAL FEASIBILITY AND COST OF PROVIDING FOR FUTURE NEEDS

a. The proposed reservoirs would be located in an area that has the highest rainfall in Oklahoma. Because of the abundant rainfall, this area is being considered more and more as a source of water supply for central and southeast Oklahoma and northern Texas.

b. Local interests have requested consideration of a navigation-water supply canal, extending from southeastern Oklahoma to the vicinity of Oklahoma City, Oklahoma, for the purpose of furnishing water for irrigation and water supply for domestic, municipal, and industrial uses in central Oklahoma. Local interests estimate that there will be need for approximately 1 billion gallons per day additional water supply in central Okla-

homa by the year 2000, and 1-3/4 billion gallons per day in the year 2025. Study of this proposal has not been completed. The Cities of Fort Worth and Dallas, Texas, have also expressed interest in obtaining water from southeastern Oklahoma.

c. The average flow at the Hugo Dam site is 1,360 mgd. Provision of 1,240,000 acre-feet of conservation storage is physically feasible in Hugo Reservoir, yielding about 900 mgd. This storage would provide near the maximum dependable yield from the basin based on continuous release during the most critical dry period, but is indicated beyond the optimum benefits over cost. The plan of improvement for stage development of Hugo, Clayton and Tuskahoma Reservoirs, yielding 620 mgd, was formulated in consideration of each project for its maximum economic capability for meeting the immediate and future needs of the area, anticipating continued economic growth beyond year 2010.

Office of the Attorney General
State of Oklahoma
Opinion No. 77-274
February 28, 1978

Mr. James R. Barnett
Acting Executive Director
Oklahoma Water Resources Board
Fifth Floor
Jim Thorpe Building
Oklahoma City, Oklahoma 73105

Dear Mr. Barnett:

The Attorney General has considered your request for an opinion on the following two (2) questions:

> "1. Can the Kaw Reservoir Authority sell and transport water issued to it under a permit granted to the Authority by the Oklahoma Water Resources Board from Kaw Reservoir to Arkansas City, Kansas?
>
> "2. Can the Oklahoma Water Resources Board issue a permit to the City of Liberal, Kansas, for 5,037 acre-feet of water from Optima Reservoir now being constructed on the North Canadian River in Texas County, Oklahoma?"

The Kaw Reservoir Authority (KRA) is a nonprofit public trust, formed in 1973, for the purpose of facilitating cooperation between local governmental units to study, analyze, and provide for the needs of member cities for treated and untreated water. Member cities include ten Oklahoma municipalities and Arkansas City, Kansas; three more Oklahoma municipalities are classified as associate members. The sale and transport of water to Arkansas City

was envisioned in Phase 2 of the Plan of Development, which KRA now proposes to implement.

The Interlocal Cooperation Act, 74 O.S. 1971, § 1001 et seq., at Section 1004(a) states:

> "Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state, and jointly with any public agency of any other state. . . ."

"Public agency" is defined at Section 1003(a) as "[A]ny political subdivision of this state; . . . and any political subdivision of another state." Thus it can be seen that the member cities of KRA, as political subdivisions of their respective states, are public agencies and may therefore, under 75 O.S. 1971, § 1004, exercise their individual powers jointly with one another; there is no loss of individual powers.

The next inquiry is whether a municipality has the authority to sell and transport water out of the State of Oklahoma. The authority of the Oklahoma Water Resources Board is limited at 82 O.S. Supp. 1977, § 1085.2(2):

> "Provided, however, no contract shall be made conveying the title or use of any waters of the State of Oklahoma to any person, firm, corporation or other state or subdivision of government, for sale or use in any other state, unless such contract be specifically authorized by an act of the Oklahoma Legislature and thereafter as approved by it."

Such a contract has been specifically authorized by the Legislature in the new Oklahoma Municipal Code (effective July 1, 1978) at 11 O.S. Supp. 1977,

§ 37-127. This is a recodification of 11 O.S. 1971, § 310.1, which was enacted in Laws of 1957. This latter statute provides, in pertinent part, that:

> "Where a private corporation which furnishes water to . . . an incorporated city or town of a state adjoining the State of Oklahoma, . . . for resale to water users therein, owns, on the effective date of this Act, the title to, or any lesser interest in, lands within the State of Oklahoma upon which is located, in whole or in part, a reservoir from which such water . . ., is obtained, which reservoir has been in existence. . . for more than one (1) year prior to the effective date of this Act, and which land, or interest therein, has been owned by such corporation for more than fifteen (15) years prior to the effective date of this Act, such incorporated city or town is hereby granted permission, if authorized or empowered by the laws of such adjoining state to do so, to acquire, by purchase, from such corporation, its title to, or lesser interest in, any such lands within the State of Oklahoma, . . . for use in connection with, but only for use in connection with, the establishment, betterment or expansion of a municipally-owned water supply or system, and the necessary protection of such water supply from pollution, and the maintenance and operation of such municipally owned water supply or system, . . ."

The corresponding enactment in the new Municipal Code is virtually identical in effect, and reestablishes April 25, 1957, as the effective date of the Act.

It can be seen that 11 O.S. 1971, § 310.1 establishes various conditions to be met prior to a sale of water such as that proposed: the buyer must be an incorporated municipality authorized by the laws of its state to make the purchase; the use must be only in connection with the establishment, betterment, or expansion of a municipally-owned water supply or system, protection of the supply from pollution, or maintenance and operation of the system; the selling private corporation must have had, as of April 25, 1957, and fifteen (15) years prior thereto, title to (or lesser interest in) the lands upon which the reservoir is located; and the reservoir must have been in existence for more than one (1) year prior to April 25, 1957. (It is to be noted that these criteria have remained virtually unchanged by enactment of 11 O.S. Supp. 1977, § 37-127, effective July 1, 1978). If the situation fits these facts, the Legislature has specifically authorized sale or use of Oklahoma waters outside the State, as required by 82 O.S. Supp. 1977, § 1085.2(2) and the Oklahoma Water Resources Board may issue a permit for such sale.

However, whether or not the political subdivisions in KRA comply with the requirements of 11 OS, 1971, § 310.1 is a question of fact to be determined by the Board upon application for a permit, and outside the scope of an Attorney General's Opinion.

Moreover, we note that 11 O.S. 1971, § 310.1 and its successor address themselves to sale by private corporations, and do not mention trust authorities such as KRA. While the trust instrument creating KRA purports to authorize a sale such as that contemplated here, whether KRA has been created and operated in such a way as to have sufficient attributes to qualify as a private corporation, within the meaning of the statute, and thus have statutory

power to sell, is another question of fact, and also outside the scope of this Attorney General's Opinion.

We recognize the case of City of Altus, Oklahoma v. Carr, 255 F. Supp. 828 (W.D. Tex. 1966), as dealing with a similar issue, but find it not dispositive of this question. In that case, a three judge federal district court held unconstitutional, as violative of the Commerce Clause, (U.S. Const. Art. I, § 8), a Texas statute providing:

> "No one shall withdraw water from any underground source in this State for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State unless the same be specifically authorized by an Act of the Texas Legislature and thereafter as approved by it." Tex. Rev. Civ. Stat. Ann. art. 7477b, § 2 (Supp. 1965)

The court found such a restriction to be a total prohibition of sale, rather than a reasonable regulation on such transactions.

Referral to 11 O.S. 1971, § 310.1 reveals that sales are not absolutely prohibited, but are permissible once certain criteria are met; the inquiry must therefore focus on whether such criteria are reasonable, or whether the criteria themselves impose an undue burden on interstate commerce.

Under our constitutional scheme, a long line of cases has established that the states retain "broad power" to legislate protection for their citizens in matters of local concern such as public health and welfare, Great Atlantic & Pacific Tea Co. Inc. v. Cottrell (Miss. 1976), 96 S.Ct. 923, 424 U.S. 366, 47 L.Ed.2d 55. The policy of the State of Oklahoma is

declared at 82 O.S. Supp. 1977, § 1085.17 to be to provide for water storage and utilization for the use and benefit of the public, for conservation and distribution for useful purposes, and to benefit the general welfare and future economic growth of the state.

Therefore, the laws regulating the use and sale of waters in Oklahoma are to promote the public health and the general welfare, and, though 11 O.S. 1971, § 310.1 and its successor, 11 O.S. Supp. 1977, § 37-127 (effective July 1, 1978) may impose certain prerequisites, these statutes cannot be said to place an impermissible burden on interstate commerce, and therefore cannot be construed as unconstitutional.

Your second question regarding application by the City of Liberal, Kansas, to the Oklahoma Water Resources Board for a permit to appropriate water from the Optima Reservoir, raises several more issues.

The first question to be dealt with is whether a municipality in a neighboring state is a proper applicant for such a permit. The authority of the Board is set forth at 82 O.S. Supp. 1977, § 1085.2; citing from subsection 4 thereof:

> "To develop statewide and local plans to assure the best and most effective use and control of water to meet both the current and long-range needs of the people of Oklahoma; . . . and to aid, at all times, counties, incorporated cities and towns and special purpose districts in the state in promoting and developing flood control and water conservation in the state." (Emphasis ours)

Further, Laws 1977, p. 1005, S.J.R. No. 7 indicates the legislative recognition of the fact that prior

beneficial use by out-of-state users may act to vest water rights, so that water originating in this state would be irretrievably lost for future needs of citizens of this state.

Considering these factors together, we consider the proposition unrealistic that an out-of-state user is a proper permit applicant before the Oklahoma Water Resources Board. We can find no intention to create the possibility that such a valuable resource as water may become bound, without compensation, to use by an out-of-state user.

We do not suggest, however, that Liberal, Kansas, may not obtain water from the state. As indicated earlier, the Legislature has provided for sale of Oklahoma water from a qualified seller in accordance with 11 O.S. 1971, § 310.1. This portion of the opinion is limited to the question of proper applicants for a permit from the Oklahoma Water Resources Board.

It is, therefore, the opinion of the Attorney General that your first question be answered as follows: The Kaw Reservoir Authority can sell and transport water issued to it under a permit granted to the Authority by the Oklahoma Water Resources Board to Arkansas City, Kansas, if the Authority can comply with the prerequisites of 11 O.S. 1971, § 310.1 and 11 O.S. Supp. 1977, § 37-127 (effective July 1, 1978) and if it has the attributes of a private corporation referenced in these statutes. Your second question must be answered in the negative; as the City of Liberal, Kansas, is not a proper permit applicant before the Board, the Board would not be authorized to issue a permit to the City of Liberal for water from the Optima Reservoir.

Sincerely,

Larry Derryberry
Attorney General of Oklahoma

Amalija J. Hodgins
Assistant Attorney General

AFFIDAVIT

STATE OF TEXAS)
)
COUNTY OF TARRANT)

The undersigned Affiant being sworn under his oath, deposes and states:

1) My name is James M. Oliver. I am the General Manager of Tarrant Regional Water District ("Tarrant"). Tarrant is a political subdivision of the State of Texas, created and existing under the authority of Article XVI, Section 59 of the Texas Constitution. In my official capacity for Tarrant, I oversee all day to day operations; manage employees; act as either primary or shared staff decision-maker; am responsible for budget, construction, operation, maintenance, repair, infrastructure, water supply and delivery matters; and report to the Board of Directors and implement its policy directives. I am a native of Tarrant County, a graduate of Nolan High School and have received both a bachelor's degree in education and a master's degree in public administration from the University of North Texas. I joined the Tarrant Regional Water District in 1983 and became its General Manager in 1986.

2) Because of my duties as General Manager, I have personal knowledge of and am familiar with what is known from Tarrant's perspective as the "Oklahoma water project," which collectively refers to Tarrant's efforts, actions and expenditures over the past five or more years to prepare for and implement a strategy of acquiring rights to appropriate water from certain Red River tributary streams located in Oklahoma near the Texas bor-

der; and to construct the necessary infrastructure to transport such water to Texas to provide secure, reliable water supply for the future within Tarrant's service area.

3) Tarrant is one of the largest raw water suppliers in the State of Texas, providing water to more than 1.6 million people in the North Central Texas area. Some of Tarrant's 30 or more wholesale, public provider customers include the cities of Fort Worth, Arlington, Mansfield and the Trinity River Authority. Tarrant's water supply service area spans a 11-county area within what is known as the "Dallas-Fort Worth Metroplex."

4) The State of Texas has undertaken extensive current and future water supply planning and analysis for the State. The State of Texas determined water planning is critical for two primary reasons: (a) the State has historically been, and continues to be, vulnerable to drought; and (b) Texas is experiencing rapid and substantial population growth.

5) In June 1997, the Texas Legislature enacted Senate Bill 1, responding to Texas's increased need for future water planning. Senate Bill 1 established a comprehensive water planning process whereby regional water planning groups are required to prepare and update water plans for each of the 16 regional planning areas in the State. The regional water planning groups each developed water plans, which were incorporated into a master State water plan in 2002 and 2007.

6) North Central Texas is within the Region C Regional Water Planning Group under Senate Bill 1 ("Region C"). Region C includes 16 counties in Texas. Tarrant's service area includes 10 of

those 16 counties (Johnson County is within Tarrant's service area but outside Region C), or approximately 35% of the population represented by Region C. Approximately 25 percent of the population of the State of Texas lives in Region C. On April 18, 2006, the Region C water plan report, known as *2006 Region C Water Plan*, was presented to the Texas Water Development Board. I am generally familiar with the 2006 Region C Water Plan ("Region C Plan").

7) The factual studies summarized in the Region C Plan confirm the imminent need for additional water supplies. The Region C Plan shows that the population in the planning area will more than double from the year 2000 level of 5,254,722 to a projected 2060 level of 13,087,849. The projected population growth in Tarrant's service area territory is expected to grow from 2,373,151 in 2010, to 3,647,099 in 2040, and to 4,745,815 in 2060.

8) The projected water demand in Region C is expected to be 3.3 million acre feet per year by 2060. Even with currently available water supplies, including both connected and unconnected supplies, it is projected that there will not be enough water to supply Region C's demands by the year 2030. A *shortfall* of approximately 1 million acre feet per year is projected in Region C at 2060. The Region C Plan concludes that "significant new water supplies" will need to be developed over the next 55 years. These future supplies need to be currently planned for and secured in order to be available when needed, due to the time involved in planning, permitting, engineering and construction of large infrastructure projects.

9) Tarrant's service area demands and future projected shortages mirror the shortages the entire Region C faces. Without development of other substantial supplies (key among them, the Oklahoma water project), Tarrant faces imminent shortages in 2030 and beyond. Tarrant projects approximately 400,000 acre feet per year shortages in 2060, if left to currently available and identified supplies and strategies. Tarrant believes there is an immediate need to identify and secure alternative sources of water in order to meet these future demands, and Tarrant has been taking ongoing active steps to provide for its water future. Tarrant continues to be a leader within the State of Texas in developing strategies for water conservation and reuse.

10) The Region C Plan specifically identifies water supplies from Oklahoma as a recommended source and strategy for providing future supply. Tarrant has conducted an ongoing process of long range planning and identifying future alternative water supplies to supplement Tarrant's current supplies. Consistent with the Region C Plan, Tarrant has identified the Oklahoma water project, as reflected in Tarrant's Applications prepared to be submitted to the Oklahoma Water Resources Board, as a preferred and economically viable alternative for meeting the needs within Tarrant's service area. Tarrant agrees with the Region C Plan findings that acquiring water within southern Oklahoma would have high reliability, minimal environmental impact, minimal agricultural impact and minimal adverse rural impacts. Tarrant intends to divert water from tributary locations just above confluences with the Red River and downstream of all major di-

version points utilized in Oklahoma. The planned Tarrant diversion points are at locations where the available water is already largely, if not completely, leaving the State of Oklahoma and bound for the Gulf of Mexico. Therefore, in my opinion there will be no practical impact on Oklahoma water supplies now or in the reasonable future and we believe sufficient water will remain to satisfy all of the reasonably anticipated future demands of Oklahoma.

Further Affiant sayeth not.

/s/ _____
James M. Oliver
[January 9, 2007]

MEMO

Date: September 17, 2007
To: Wayne Owen, Tarrant Regional Water District
CC: Kevin Patrick - PMK; Robert Smith; Bob Brandes - TRC/Brandes, File A011-ATU1
From: Dan Buhman, KBR
Subject: Red River Water Availability at the Red River Streamflow Gage near Terral, Oklahoma

Purpose:

Tarrant Regional Water District (TRWD) tasked KBR with the evaluation of water availability from the main stem of the Red River downstream of the confluence of Beaver Creek and the Red River. The purpose of this analysis is to estimate the quantity of water potentially available for appropriation from the Red River upstream of Lake Texoma. The analysis consisted of three key tasks:

- TRC/Brandes analyzed existing WRAP computer simulation modeling results published by the Texas Commission on Environmental Quality (TCEQ) for the Red River basin.
- KBR analyzed Oklahoma water availability using published hydrology and by performing further calculations using data available from the Oklahoma Water Resources Board (OWRB).
- KBR researched the impact of the Red River Compact on availability in the main stem of the Red River upstream of Lake Texoma.

Findings:

This section presents three findings. First, the amount of water available for appropriation from the main stem of the Red River from the state of Oklahoma is presented. Second, the amount of water available for appropriation from the main stem of the Red River from the state of Texas is shown. Both of these results do not account for Red River Compact rules. The Red River Compact will be analyzed lastly to determine the impact on water availability from both states.

OWRB rules specify that the determination of water available for new appropriations is based on a full authorization scenario (i.e., full utilization of existing water rights) under average climatic conditions. According to these rules and the calculations performed in this analysis, the amount of surface water available for appropriation in Oklahoma is between 407,000 acre-ft/yr and 584,500 acre-ft/yr. The difference is due to accounting for ground water demand. The lower availability result assumes that all future demand is met by surface water; the higher availability result accounts for the portion of demand met by groundwater supply (thus making more surface water available).

The evaluation of water available for appropriation in Texas is based on Run 3 of the published TCEQ water availability models, also called the "Full Authorization" scenario, and is based on the firm yield. According to these published models, the firm yield available for appropriation in the Red River near Terral, Oklahoma is 0 acre-ft/year. Red River flows in Texas are appropriated up to approximately 370,000 acre-feet upstream of Terral and 190,000 acre-feet downstream of Terral (senior rights that

require pass-through flows). Maximum naturalized and regulated flow maximums exceed 1,000,000 acre-feet, so that it appears drought firm yield being zero is because of drought conditions causing appropriations to exceed availability for more than 12 months. The tables below summarize these availability calculations for each state.

[Tables omitted.]

Oklahoma Water Resources Board: Oklahoma Water Facts (January 9, 2007).

Groundwater

- Oklahoma is underlain by 23 major groundwater basins containing 320 million acre-feet of water in storage, though only one-half of that amount may be recoverable. Groundwater is the prevalent source of water in the western half of the state.
- The state's largest groundwater basin, the Ogallala Aquifer in western Oklahoma, contains 86.6 million acre-feet of supply--enough to cover the entire state two feet deep.

Surface Water

- Oklahoma has approximately 11,611 miles of shoreline, slightly less than the estimated combined general (nontidal) coastline of the Atlantic, Gulf, Pacific, and Arctic Coasts (12,383 miles).
- Oklahoma has approximately 78,578 miles of rivers/streams (about three times the circumference of the Earth and one-third the distance to the moon.)
- Oklahoma's longest river is the Beaver/North Canadian River (766 miles); the Red River is the second longest (592 miles).
- Oklahoma contains approximately 1,120 square miles of water area in its lake and ponds.
- Oklahoma's largest lake in surface area is Eufaula (105,000 acres); Lake Texoma is second (88,000 acres). The state's largest lake in conservation storage is Texoma (2.6 mil-

lion acre-feet of water); Eufaula is second (2.3 million acre-feet).

- Average annual lake evaporation in Oklahoma ranges from 48 inches in the extreme east to 65 inches in the southwest, numbers that far exceed the average yearly rainfall in those areas.

Water Use

- Irrigation is the number one use of water in Oklahoma; water supply is a close second, followed distantly by livestock watering.
- Groundwater accounts for almost 90 percent of total irrigation water use in Oklahoma.
- The majority of the state's surface water (approximately 60 percent) is used for public water supply, followed by thermoelectric power generation and irrigation.
- Evaporation and percolation preclude immediate use of approximately 80 percent of Oklahoma stream water.
- The approximate number of stream water permits on file at the OWRB is 2,600; the approximate total allocated stream water use in Oklahoma is 2.6 million ac-ft/year.
- The approximate number of groundwater permits on file at the OWRB is 10,000; the approximate total allocated groundwater use in Oklahoma is 3.2 million ac-ft/year.
- An estimated 34 million acre-feet of unused water flows out of the state each year through Oklahoma's two major river basins, the Red and Arkansas.

Flooding

- Almost half of flood-related deaths occur in vehicles, primarily when people drive into flooded highway dips or low-drainage areas at night.
- There are approximately 40,000 structures in Oklahoma that reside within the boundaries of the regulatory floodplain, yet less than 10,000 of these are covered by flood insurance.

Rainfall

- One inch of rain falling on a 160 acre field delivers 4,344,680 gallons of water, or 13.3 acre feet. It would take just over 4 miles of 80,000 gallon capacity railroad tank cars to transport this amount of water, which would weigh more than 18,000 tons.

Oklahoma Water News

2nd Quarter 2009

* * *

New Bill Protects Oklahoma Water Rights

House Bill 1483, sponsored by Rep. Dale DeWitt and signed by Governor Henry, will provide additional protection for Oklahoma's water interests by declaring that no out-of-state water permit shall impair the state of Oklahoma from meeting its obligations under interstate compacts with other states. According to Rep. DeWitt, the bill will ensure we protect Oklahoma's water supply and that our future need for water will take precedence over out-of-state-water sales.

OWRB Executive Director Duane Smith agrees: "This bill represents the most consequential water legislation in recent memory in that it gives Oklahoma much greater security in both the current and future use of its surface water resources."

While, in the past, the U.S. Supreme Court has made it clear that it views water as an article of interstate commerce, the courts have also said that a state can restrict the export of water if that water is apportioned to the state through an interstate stream compact, Smith points out. All Oklahoma waters are subject to fair apportionment through four separate federal compacts to which it is a party with neighboring states.

"Through this bill, the State Legislature is utilizing existing interstate agreements, each approved by Congress, to exercise Oklahoma's right to control the use of its water," Smith points out. He adds that the bill does not impact the state's existing moratorium on out of state water transfers and it actually streng-

thens oversight through requiring legislative approval of water apportioned to Oklahoma through the interstate compacts.

Within the last few years, the OWRB has received several applications for permits, including from Texas water entities, to use stream water outside the state. The state's current moratorium set to expire on November 1, 2009, prevents the export or use of water out of state. The moratorium and related statutes have been attacked in litigation before two federal district courts.

Another section of the bill amends current law on the criteria that the Board must review before deciding whether to issue a permit to use stream water. This new language provides additional factors—such as consideration of instate needs and whether the water in question could feasibly be transported to alleviate anticipated water shortages in Oklahoma—that the OWRB would consider prior to approval of an out-of-state water use permit application. In addition, HB 1483 provides a system to review out-of-state permits every 10 years.

[Rep. Brian Renegar, Oklahoma House of Representatives District 17]

CAPITAL GREETINGS

Weekly update from Oklahoma City

* * *

May 7, 2009

* * *

On another note, HB 1483 by Rep. Dale Dewitt (R-Braman), a shell bill that has a Water Title, came out yesterday. The Oklahoma Water Resources Board inserted my New Mexico Water language, which is a good thing, but they struck language that takes final approval of all water sales from the State Legislature. This has always been a huge safety net for the people of Oklahoma. The Board also inserted language in the bill that will repeal the Out of State Water Moratorium. These two points will be the reason I will be voting against this measure and actively work to change or kill this bill. I have multiple confirmed and reliable sources that the Chiefs of Staff for both the Speaker of the House and the Speaker Pro Tempore of the Senate have been negotiating with Tarrant County Water District. These are the people that want our water. Can you see what is going on here?

Today, May 7th, is National Prayer Day, I ask each of you to pray for not only our water but also for our Legislature to do the right thing! Please continue to pray for me and my staff.

God Bless each of you.

eCapitol News

OK–Water board discusses draft of bill to address lawsuit

Author: William W. Savage III

Date: 05/12/2009

(OK) At its Tuesday meeting, the Oklahoma Water Resources Board reviewed the latest draft of legislation intended to bring to an end a pending lawsuit against the state.

That legislation would need to be placed in a bill currently in conference, although which one is not immediately clear.

Executive Director Duane Smith, who went change-by-change through the bill draft with members of the board, said it is not known whether the bill will be passed this session, but he did confirm that its intent is to remove the restrictions being challenged in the lawsuit with Texas' Tarrant County Regional Water District and establish guidelines for selling water out of state that are consistent with New Mexico's well known water sale act.

"What we're trying to do is make this statute apply to all pending applications," Smith told members. "Some of the feedback I've heard [from legislators] is, 'oh my gosh, we don't want to remove that legislative oversight.'"

Smith was referring to repealers in the drafted bill intended to remove the basis of Tarrant County's lawsuit against the state. Chiefly, the bill would repeal legislative oversight of any water sale out of state.

"What we're hearing from the governor's office and from legislators, mostly from southeastern Oklahoma, is that they are very uncomfortable with the repealer language," Smith said. "But if passed, our argument would be that the judge should throw out the lawsuit."

Smith affirmed to the board, "We're not trying to keep anything secret on this.

"People think this is the first step to sell [water] to Texas," Smith said. "We're not working on a water sale. The governor has been very clear on that. We are not to do so.

"It is our view that, if [the language] is left in, we can't have our best legal [situation] put forward," he said.

The drafted proposal would make the same rules and regulations upon water sales apply to any out-of-state entity. Those new rules and regulations include a virtual litmus test of Oklahoma's water situation, supply, demand and the effects that each individual sale might have on those topics. They also include an analysis of the purchasing entity's supply, demand and situation, and the bill would provide for a mandatory 10-year analysis by the board of each existing contract and the ability for the board to change such contract if either the state's or the purchaser's situation has significantly changed.

Smith also said such analysis could be done at any time, not just every 10 years.

One of the bills that the water legislation could be attached to is HB 1483, by Rep. Dale DeWitt, R-Braman, and Sen. Ron Justice, R-Chickasha, which is in conference committee and is under the same title of law, Title 82. The bill requires the Oklahoma

Water Resources Board, when granting water rights outside the state, to give pending in-state applications first consideration over out-of-state applications to ensure all in-state needs are met.

Smith said there are also Senate options.

In other business, Smith also told members Tuesday of another interesting development regarding Lake Texoma. The lake, which is about 1.4 million acre feet of water, is split 50-50 between Oklahoma and Texas under the Red River Compact.

Smith said the U.S. Army Corps of Engineers uses much of the water to create hydroelectric power, and a recent analysis revealed that 100 percent of that power goes to Texas.

"So, we're trying to evaluate that," Smith said. "What does that mean? Is that a violation of the compact?"

Board member Rudy Herrmann had an idea.

"Well, we could reclaim half that power and then sell it to Texas," Herrmann said.

Smith smiled and paused.

"So ...," he said, moving on to another topic.

The board is scheduled to meet again on June 9.

OKLAHOMA WATER RESOURCES BOARD
OFFICIAL MINUTES

June 9, 2009

* * *

Ms. Lambert suggested the Board express its appreciation to the Governor and Legislators. Chairman Nichols complimented Mr. Smith and Mr. Couch for their diligent work on the issue. Mr. Keeley asked if the moratorium had been removed; Mr. Smith said that would be one interpretation, and there could be another interpretation as well. He said that clearly there is still legislative oversight. Mr. Drummond asked about the inclusion of the "New Mexico" language; Mr. Smith said that it is, and he explained the language as it appeared on page two and three (section 2, number 1); he said the Board will get a chance to decide what the language means, along with meetings with the public and technical and water plan involvement. Mr. Keeley asked about the effect (of the legislation) on the Tarrant case, and Mr. Smith said there have been some motions made and to the extent the case is altered or dismissed there are ongoing meetings with the Attorney General's office and with Chuck Dumars to determine the state's legal position, but at this time he did not know the result would be.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

TARRANT REGIONAL WATER DISTRICT, a Texas State Agency	)	
vs.	)	CASE NO. CIV-07-0045-HE
RUDOLF JOHN HERRMANN, JESS MARK NICHOLS, LINDA LAMBERT, FORD DRUMMOND, LONNIE FARMER, ED FITE, JACK W. KEELEY, KENNETH K. KNOWLES, and RICHARD SEVENOAKS, In their Official Capacities as Members of the Oklahoma Water Resources Board ("OWRB")	)	

ORAL VIDEOTAPED DEPOSITION
HERMAN SETTEMEYER
September 30, 2009

[Tr. 10] state entity and so if I refer to the Red River Compact Commission, I'm referring to the state entity.

A. Okay.

Q. If I want to talk about the interstate entity, I will specifically designate that. Is that fair?

A. That's fine.

Q. Okay. So the Red River Compact Commission was formerly a separate agency and is now a division of the TCEQ, is that accurate?

A. No. I believe it would be more accurate to say that the Red River Compact Commission retains its own identity at the TCEQ. It is housed at the TCEQ for budgetary purposes. And for budgetary purposes it's kind of -- it's listed as a strategy within our appropriation requests. Our appropriation requests being TCEQ's.

Q. Okay. What is your role with the state Red River Compact Commission?

A. I serve as engineer advisor to the Texas Commissioners.

Q. How long have you served in that capacity?

A. Since 1987 except for that one month.

Q. Have you ever attended meetings of the interstate Red River Compact Commission?

A. Yes.

[Tr. 11] Q. On how many occasions?

A. Nearly all of the meetings since 1987.

Q. Has either of the commissioners from the State of Texas ever asked you to sit in their place at a meeting of the interstate Red River Compact Commission?

A. Yes.

Q. How would you describe that? Is that like a delegation? What word would you use to describe that?

A. They -- from -- the commissioner associated with the executive director's office has asked me to provide a letter whereby I was to act in their behalf.

Q. On how many occasions have you attended as a commissioner on behalf of the executive director?

A. Approximately four.

Q. Do you remember what years?

A. My recollection is it was the last four years.

Q. So that would be 2008, 2007, 2006, and 2005?

A. No, it would be 2009, 8, 7, and 6. We've had our annual meeting in 2009.

Q. Have you ever served on a committee of the interstate Red River Compact Commission?

A. Yes.

Q. Tell me about that.

A. Well, I serve on the engineer advisors committee, I'm the Texas representative on the engineer

* * *

[Tr. 22] Q. Okay. I'm going to ask a follow-up question, you can give me the same answer, you can say, "I can't answer it," but I'm going to ask it and you decide. Do you think it would -- do you think there's any likelihood that it will take longer than a decade?

A. I hope not.

Q. Okay.

A. I mean, I can't answer that question because, I mean, I can't speak for the Corps.

Q. Fair enough. All right. Let me have you turn to the page marked No. 9 at the bottom, and there's a

section titled "Short Definition" about the middle of the page, do you see that?

A. Mm-hmm.

Q. Would you read that into the record?

A. "Short Definition. Using the reports of the engineering and legal committees of the interstate commission, water shortages to Texas users will be evaluated. If no shortages exist, Texas has received 100 percent of its equitable share. As used in this measure, 'equitable share' is defined as lack of water shortages."

Q. And could you tell us what that means?

A. The intent of that definition is to basically provide us a mechanism to report a goal under the agency

[Tr. 23] goals of the Red River Compact Commission. It's defined as if the Texas users or Texas water right holders in existence at this time, if they have identified any shortages to us relating to waters that they anticipate receiving under the Red River Compact, then they would have reported that to the TCEQ. If our water users don't report any shortages of water that they believe they should have received under the compact, then we use that as to indicate that Texas was receiving the waters under the compact that it believed it should receive.

Q. Okay. Let me -- I'm going to ask a couple follow-up questions on that to make sure I understand. So the Red River Compact allocates a quantity of water to Texas, is that correct?

A. Yes.

Q. And if I understand correctly, at the time this document was prepared, Texas chose as a mechan-

ism to define that quantity of water allocated by the Red River Compact Commission, Texas chose to define that quantity by a lack of shortage, is that accurate?

A. Let me, let me explain it again.

Q. Sure.

A. Texas under the compact has a certain amount of water allocated per each reach of the compact. We have permitted, water right permitted users within Texas,

[Tr. 24] plus we have domestic and livestock users within Texas that are not permitted. We chose to identify as an outcome to report that if none of our water users, our existing permit water users reported any shortfalls caused by underdeliveries of the compact, then we would report that as 100 percent.

Q. Okay. Let me direct your attention to the page marked 16 at the bottom. And what is this chart?

A. Those are our -- the strategic plan is prepared for five years.

Q. Mm-hmm.

A. And so when we prepared this in --

Q. February 1st, 2005, I believe.

A. Okay.

Q. At the bottom there.

A. No, that's the term of our commissioner.

Q. Oh.

A. That's what that means.

Q. Okay, yup.

A. Anyway, whenever we -- it's based on a five-year projection, and when we prepared this, our goal was to receive 100 percent of the water that we were allocated under the compact.

Q. And according to this chart, it was expected that the Red River Compact Commission would accomplish

[Tr. 25] that goal of 100 percent delivery in 2005, 2006, 2007, 2008, and 2009, is that -- am I reading that correctly?

A. No, not exactly.

Q. Okay.

A. It was the goal of the Red River Compact Commission for Texas that Texas would receive 100 percent of its allocated waters.

Q. Okay. So let me direct your attention to page 9, and there we have the goal, right?

A. Mm-hmm.

Q. So read, if you would, the goal of the Red River Compact Commission.

A. "The Red River Compact Commission will insure delivery of Texas' equitable share of quality water from the Red River and its tributaries as apportioned by the Red River Compact."

Q. Okay. Did the Texas Red River Compact Commission meet that objective in the year 2005?

A. I believe it did.

Q. Did the Texas Red River Compact Commission meet that objective in 2006?

A. I believe it did.

Q. Did the Red River Compact Commission meet that objective in 2007?

A. I believe it did.

[Tr. 26] Q. Did the Texas Red River Compact Commission meet that objective in 2008?

A. I believe it did.

Q. And so far has the Texas Red River Compact Commission met that objective in the year 2009?

A. Well, it met its objective in 2009 because it's done on the state fiscal year.

Q. So from 2005 to present Texas has received all of the water allocated to it by the Red River Compact Commission?

A. Texas' existing permittees and our water users have not reported to us any shortages of waters due to compact compliance issues. As such, we have reported the 100 percent -- receiving 100 percent of our share of quality water from the Red River and its tributaries.

Q. And that's the metric that Texas decided to use during this period to decide how much water it was receiving, is that correct?

A. Yes.

Q. Okay. So --

A. That explanation, yes, is how we chose to do that.

Q. So from 2005 to present Texas has received all of the water that was allocated to it by the Red River Compact?

[Tr. 27] A. That's the same question you just asked.

Q. Uh-huh.

A. Did you want me to repeat what I said before?

Q. If you could give me a yes-or-no answer, that would be excellent.

A. Our Texas water users have not reported any shortfalls in the years 2005, 6, 7, 8, and 9 relating to compact issues.

Q. Which is the metric that Texas chose to use to decide whether it was receiving its share of the water?

A. That's correct.

Q. So is that a yes, then, that Texas did receive all of the water allocated to it by the Red River Compact during that period?

MR. BOHL: Counsel, I'm going to object in that you're harassing the witness. He's asked -- you've asked the question two or three times and he's answered it two or three times.

MR. METCALFE: All right. Fair enough. I'll move on. Thank you.

MR. BOHL: Thank you.

Q. (BY MR. METCALFE) What -- what will Texas do when it begins facing a shortage? When I say "a shortage," referring to the metric here that if there's no shortage, that means Texas has received its share,

[Tr. 28] when there comes a time when Texas has a shortage from the Red River and its tributaries, what will Texas do?

A. Well, in accordance with our provisions here, for Texas to receive a shortage there would have to

be an underdelivery of water to Texas via the Red River Compact. I don't know what Texas will do.

Q. Okay. Do you think it's possible that Texas would look to the interstate Red River Compact Commission to resolve underdeliveries?

A. It's possible.

Q. Is it your understanding that Texas has the option of filing suit in Federal Court against other states if there becomes an irreconcilable dispute over allocation?

A. It's my understanding that Texas has the option to file litigation in Federal Court regarding the Red River Compact, yes.

Q. Okay. So referring back to this plan that you have in front of you that's the strategic plan for fiscal years 2005 through 2009, will this plan be updated? Fiscal year 2009 is over. Do you anticipate a sequel?

A. No.

Q. Okay. Because this plan pertained to the budget of a separate state agency?

[Tr. 29] A. That's correct. This plan was prepared through the appropriation process by the Red River Compact Commission when we were our own separate state agency.

Q. So there's no longer a legal requirement that the Red River Compact Commission prepare a document like this?

A. That's correct.

(Exhibit 7 marked)

Q. (BY MR. METCALFE) You can set that aside if you'd like. I'm going to hand you what's been

marked as Exhibit No. 7 and tell you that that is a certified copy of TCEQ's file on Application 12268, and let me ask you to just flip through that and see if you recognize that?

A. Repeat that question again.

Q. So my first question is have you ever seen that before, that actual bound and certified copy that I just handed to you?

A. No.

Q. Okay. Are you familiar with TCEQ's file on that specific application?

A. Are you -- I don't want to be --

Q. Sure.

A. Are you asking me if I am familiar with what's in the file for this application?

Q. Yes.

[Tr. 30] A. No.

Q. Okay. And that's fine. Do you have an understanding about what that file pertains to?

A. I've seen, I've seen the first letter.

Q. Okay. And you're in fact listed as a blind carbon copy recipient on that first letter, are you not?

A. Yes.

Q. So how familiar are you -- how familiar are you with this specific application?

A. I know we got one.

Q. Okay. Do you know anything else about it?

A. I know generally that the application was filed to obtain a permit for water from the Kiamichi River in Oklahoma.

Q. And the applicant is the Tarrant Regional Water District, is that correct?

A. That's correct.

Q. Now, if I understood correctly, and please correct me if I'm wrong, but you said that you do recall seeing this first letter dated January 28th, 2007?

A. Yes.

Q. And that's the letter from Kellye Rila, manager in TCEQ, to Michael Booth, is that correct?

A. That's correct.

Q. What do you recall about receiving this letter?

[Tr. 31] A. I recall they sent me a copy.

Q. Okay. And what was the outcome of Tarrant's application to appropriate water from the Kiamichi River in Oklahoma?

A. The application was returned to the applicant.

Q. And what does that mean?

A. The application was returned to the applicant, and the TCEQ did not process the application.

Q. Why did TCEQ not process the application?

A. Because the executive director determined that the TCEQ does not have jurisdiction to process an application requesting a diversion of water from the Kiamichi River.

Q. Have you talked with anybody at all about this application, excluding your attorney?

A. Repeat the question again so I can --

Q. Sure.

A. -- make sure I answer it correctly.

Q. Excluding Mr. Bohl, have you talked with anybody ever about this application?

A. Yes.

Q. With whom have you spoken?

A. I spoke with Kellye. When the application came in, we had an internal meeting at TCEQ.

Q. Uh-huh.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) TARRANT REGIONAL WATER DISTRICT, a Texas State Agency,	)	
Plaintiff,	)	
v.	)	Case No. CV-07-0045-HE
(1) RUDOLF JOHN HERRMANN, (2) JESS MARK NICHOLS, (3) LINDA LAMBERT, (4) FORD DRUMMOND, (5) JOSEPH E. TARON, (6) ED FITE, (7) JACK W. KEELEY, (8) KENNETH K. KNOWLES, and (9) RICHARD SEVENOAKS, In Their Official Capacities as Members of the Oklahoma Water Resources Board ("OWRB") and the Oklahoma Water Conservation Storage Commission,	)	
Defendants.	)	

FINAL PRETRIAL REPORT

* * *

3. STIPULATED FACTS.

A. Defendants are the Board Members of the Oklahoma Water Resources Board ("OWRB") and Oklahoma Conservation Storage Commission ("Commission") acting in their official capacities. The OWRB and Commission are the agencies responsible for the appropriation and use of water in Oklahoma.

B. Plaintiff is a Texas citizen and Defendants are all Oklahoma citizens. Venue is proper in this Court.

C. Approximately 2.6 million acre feet of stream water is now allocated for use in Oklahoma.

D. Plaintiff has filed Applications to appropriate stream water in Oklahoma with the OWRB. These Applications seek 310,000 acre-feet of water from the Kiamichi River below Hugo Dam, 125,000 acre-feet of water from Cache Creek and 25,000 acre-feet of water from Beaver Creek at points of diversion upstream from the confluences of these watercourses and the Red River, in Oklahoma.

E. The Parties filed a Joint Motion for Order Approving Stipulation [Doc. No. 12], containing the following stipulation: "Defendants will not act upon or take any action respecting Plaintiff's three Applications filed January 11, 2007 in the OWRB for appropriations from the Kiamichi River, Cache Creek, and Beaver Creek, which Applications are the subject of Plaintiff's Complaint herein, until disposition of the case currently pending." Further, "Defendants do not by such stipulation waive any objection or defense in this action which could otherwise be as-

serted in this action and Plaintiff will not raise waiver of defenses due to this stipulation."

F. By a Stipulation and Agreement, the Parties further stipulated to the following: "Defendants will not raise as a defense or introduce evidence in this case that Oklahoma is suffering a severe water shortage or a state-wide water shortage, nor will Defendants argue in this case that the laws challenged by Plaintiff (described in Plaintiff's Complaint and Supplemental Complaint) are justified due to a severe water shortage or a state-wide water shortage."

* * *

5. CONTENTIONS AND CLAIMS FOR DAMAGES OR OTHER RELIEF SOUGHT:

A. Plaintiff:

1. Plaintiff seeks a declaration that each of the laws constituting the Embargo is unconstitutional under the dormant Commerce Clause of the US Constitution.

2. Plaintiff seeks a declaration that each of the laws constituting the Embargo are unconstitutional under the Supremacy Clause of the US Constitution as being preempted by federal law, the Red River Compact.

3. Plaintiff seeks a permanent injunction that the laws of Embargo will not be applied against Plaintiff's attempts and activities to acquire water in Oklahoma through appropriation, purchase or otherwise.

B. Defendants:

Defendants assert no claims or counterclaims, but request that the Court find that the challenged legislation, including the recently-enacted HB 1483,

is fully constitutional. Defendants continue to assert that at trial it will become evident that Tarrant is not the real party in interest as to entitlements under the Red River Compact and that furthermore the institution with primary jurisdiction is the Red River Compact Commission.

[November 16, 2009]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) TARRANT REGIONAL WATER DISTRICT, a political subdivision of the State of Texas,	)	
Plaintiff,	)	
	)	Case No. CIV-07-45-HE
v.	)	
(1) RUDOLF JOHN HERRMANN, (2) JESS MARK NICHOLS, (3) LINDA LAMBERT, (4) FORD DRUMMOND, (5) JOSEPH E. TARON, (6) ED FITE, (7) JACK W. KEELEY, (8) KENNETH K. KNOWLES, and (9) RICHARD SEVENOAKS, In Their Official Capacities as Members of the Oklahoma Water Resources Board ("OWRB") and the Oklahoma Water Conservation Storage Commission,	)	**[Amended Complaint]**
Defendants.	)	

AMENDED COMPLAINT

Plaintiff Tarrant Regional Water District ("Plaintiff" or "TRWD") brings this action for declaratory and injunctive relief to enforce its right to appropriate, transfer and export stream or ground water in Oklahoma pursuant to the Supremacy Clause (by virtue of the Red River Compact) and Commerce Clause of the U.S. Constitution.

INTRODUCTORY ALLEGATIONS

1. Plaintiff supplies public water to more than 1.7 million people in North Central Texas area. Oklahoma has declared and implemented a public policy to forbid nonresidents from acquiring water located in Oklahoma. This unlawful public policy to embargo Oklahoma water is embodied in a variety of statutes, and in Oklahoma Attorney General Opinion No. 77-274 (the "Anti-Export Laws"), which bind the Oklahoma Water Resources Board, the Oklahoma administrative agency responsible for regulatory supervision over appropriation, sale, and use of water located in Oklahoma. Oklahoma's Anti-Export Laws conflict with the Red River Compact and are preempted under the Supremacy Clause; and unlawfully discriminate against interstate commerce in violation of the Commerce Clause. Plaintiff seeks declaratory and injunctive relief against the embargo.

PARTIES

2. Plaintiff TRWD is a political subdivision of the state of Texas. Vernon's Ann.Texas Const. Art. 16, § 59(b); Tex. Water Code § 51.001 et seq. Plaintiff is one of the largest raw water suppliers in the state of Texas, providing water to more than 1.7 million people in the North Central Texas area, including the cities of Fort Worth, Arlington, and Mansfield,

and the Trinity River Authority which is itself a state governmental agency providing water and waste water services in 17 Texas counties within the Trinity River Basin.

3. Defendants are Rudolf John Herrmann, Jess Mark Nichols, Linda Lambert, Ford Drummond, Joseph E. Taron, Ed Fite, Jack W. Keeley, Kenneth K. Knowles, and Richard Sevenoaks. Defendants are the nine members of the Oklahoma Water Resources Board ("OWRB"), which is the Oklahoma agency responsible for enforcing Oklahoma laws which regulate the appropriation, sale, and use of Oklahoma surface water and groundwater. The OWRB is created pursuant to 82 O.S. (2008 Supp.), §1085.1 and its broad functions are set forth in 82 O.S. (2008 Supp.), §1085.2. Defendants are *ex officio* also the members of the Oklahoma Water Conservation Storage Commission, created by 82 O.S. 2001, §1085.18, and thus subject to statutory duties some of which are challenged as unconstitutional herein. The individual Defendants (who have no choice but to follow Oklahoma's unconstitutional Anti-Export Laws) are acting under color of state law and are sued herein only in their official capacities, not in their individual capacities.

JURISDICTION

4. This Court has subject matter jurisdiction over this action pursuant to both 28 U.S.C. §1331 and §1332. See also 82 O.S. 2001, §1431 (Section 13.03 of Red River Compact, approved by Congress, Pub. L. No. 96-564, 94 Stat. 3305, December 22, 1980), which confers original jurisdiction on federal district courts.

5. Plaintiff brings this action to determine and enforce its rights to appropriate or purchase water in Oklahoma as protected by the Supremacy Clause

(Art. 6, Parag. 2) and the Commerce Clause (Art. 1, Section 8, Clause 3) of the United States Constitution. Plaintiff seeks declaratory relief pursuant to 28 U.S.C. §2201 and equitable relief pursuant to 28 U.S.C. §2202 and Fed.R.Civ.P. 65.

6. Plaintiff is a citizen of the State of Texas and Defendants are citizens of the State of Oklahoma, and the amount in controversy is in excess of $75,000, exclusive of interest and costs.

VENUE

7. Defendants are sued in their official capacities as members of the OWRB, a state agency with its public office in this judicial district. Venue is proper in the Western District of Oklahoma, which is the judicial district within which the Defendants, the members of OWRB's board of directors, perform their official duties. 28 U.S.C. §1391(b). Venue is also proper pursuant to Section 13.03 of the Red River Compact, since this action requires application and construction of that Compact. 82 O.S. 2001, §1431 (Section 13.03).

GENERAL FACTUAL BACKGROUND

Oklahoma's Abundance of Water

8. Oklahoma has an abundance of surface water. OWRB reports that the approximate total allocated water use in Oklahoma is 2.6 million acre feet per year, only about 7.6% of the estimated 34 million acre-feet of unused water flowing *out* of the state each year through Oklahoma's two major river basins, the Red River and Arkansas River.

9. Oklahoma also has an abundance of groundwater. OWRB publications confirm that approximately 320 million acre feet of groundwater under-

lay the State of Oklahoma. Approximately 1% of this groundwater is currently appropriated for use.

10. Oklahoma has no basis upon which to predict, and has not predicted that it will suffer any water shortage in the near or even distant future. Indeed the OWRB has repeatedly affirmed that Oklahoma has more than sufficient resources to meet its need. Oklahoma has stipulated in this proceeding that it will not seek to raise as a defense of its laws that Oklahoma is suffering a water shortage. *Doc. 130, Page 5.*

11. Further, as justification for the Moratorium, the Oklahoma Legislature's edicts for a study by a Joint Committee on Water Planning to determine conservation and preservation needs were never implemented; the committee was never organized, never met, and neither performed nor reported conclusions on the work directed. Subsequently, eleven months after this lawsuit was filed, Oklahoma repealed the section creating the Joint Committee on Water Planning. *Laws 2007, c. 93, §16, eff. Nov. 1, 2007, repealing 82 O.S. §1C.*

12. Oklahoma's embargo of its water resources, alleged more particularly below, have an unconstitutional economic protectionist purpose of preventing the exportation of water from Oklahoma to Texas.

Projected Water Shortage in Communities Served by Plaintiff

13. The Texas communities served by Plaintiff face a long-range water shortage if additional water sources are not acquired. Plaintiff has conducted a comprehensive long range utility plan to assess the water demands for the communities it serves through the year 2060, by which time its population

base is expected to more than double. Plaintiff has reviewed all census and local planning jurisdiction databases to determine expected demands, and has investigated the yield of all of its water resources and water projects. The result of this comprehensive study shows that the water demands of the Texas communities served by Plaintiff will exceed projected water supplies. By the year 2060, the deficiency will be in excess of 400,000 acre feet per year.

14. Plaintiff has executed Interlocal Cooperation Contracts With Upper Trinity Regional Water District, North Texas Municipal Water District and Dallas Water Utilities to develop additional water supplies for the demands of the North Texas region. These four water suppliers together provide nearly all of the water supplies for the Dallas-Fort Worth Metroplex, which is the fourth largest metropolitan area in the United States. By the year 2060, the deficiency of available supplies to meet expected demands of these providers will exceed 1,646,000 acre feet.

15. Plaintiff has studied the feasibility of potential sources of water, and has specifically identified acquisition of water within Oklahoma as the most practical and recommended water resource to meet a substantial portion of the needs of the areas served by Plaintiff.

The Waste of Vast Quantities of Oklahoma Water

16. The quantity of water which Plaintiff seeks to appropriate or purchase within Oklahoma, to meet annual long-range needs of the Texas communities, is a small fraction of the amount of water which is stored under ground or annually discharged from the watercourses located in Oklahoma from which Plain-

tiff wishes to acquire water. Such surface water is discharged, unused, into the Red River, where its water quality is degraded to a degree making it economically infeasible to be diverted and treated to meet potable water standards. This water flows to the Gulf of Mexico where it is lost to beneficial use.

17. After commencement of this action Plaintiff filed applications with OWRB for appropriations from three surface water courses located in southern Oklahoma seeking a cumulative total of 460,000 acre feet per year which, even if granted, will constitute only about 1/9th of the remaining available water (about 4,000,000 acre feet per year) in these water courses that will otherwise be discharged in the Gulf of Mexico and lost to beneficial use – i.e., Oklahoma will still be annually wasting about eight times the quantity of water Plaintiff has appropriated from those streams.

18. Plaintiff has also secured contracts for the sale or transfer to Plaintiff of: a) groundwater in Oklahoma; and b) Indian reserved water rights held by tribal nations. These contracts are frustrated from reaching consummation due to the threat of enforcement of the Anti-Export Laws.

THE RED RIVER COMPACT

19. The Red River Compact ("Compact") among the States of Arkansas, Louisiana, Oklahoma, and Texas, is approved by Congress pursuant to Art. I, Section 10, Cl. 3, U.S. Constitution (Pub. L. No. 96-564, 94 Stat. 3305, December 22, 1980). Under the Compact, Texas is apportioned certain stream water, including without limitation waters within Oklahoma that Plaintiff seeks to appropriate within the Kiamichi River watershed. The Compact delineates conditions under which and quantities for which

Texas has an equal right of access and use, notwithstanding that the water is located in Oklahoma. Diversions at these points constitute "mainstem" diversions under the Compact -- *i.e.*, they are treated as if the water was taken from the Red River itself.

OKLAHOMA'S UNCONSTITUTIONAL PUBLIC POLICY AND LAWS FORBIDDING EXPORT OF WATER

20. Oklahoma has declared a public policy to embargo water which is located within Oklahoma, preventing citizens of other states from acquiring rights to such water. Oklahoma's public policy is expressly and implicitly incorporated into its laws, reflected in an Opinion of its Attorney General, and imposed upon the Defendants who are charged with implementing Oklahoma's laws relating to water resources, and who are required to follow an Oklahoma Attorney General Opinion that has not been superseded by judicial authority.

21. The Oklahoma Legislature has expressly declared Oklahoma's public policy to prevent nonresidents from acquiring water from Oklahoma. 82 O.S. 2001, §1086.1(A)(3) states:

> Water use within Oklahoma should be developed to the maximum extent feasible for the benefit of Oklahoma so that out-of-state downstream users will not acquire vested rights therein to the detriment of the citizens of this state; ....

Oklahoma's public policy is similarly reflected in 1977 Okla. Session Laws 1005, S.J. Res. No. 7, declaring -- contrary to governing constitutional doctrine -- that Oklahoma possessed "legal title" to unappropriated water which would otherwise flow out of the

state (*i.e.*, "it is possible that by continuing to allow water to flow out of state, Oklahoma's legal title to such water might become questionable"), and that Oklahoma asserted a "prior right for the State of Oklahoma" over "the ususued and uncontrolled water flowing from the state" in a quantity about four times the amount which it has even *currently* appropriated to beneficial uses, or such other amount that Oklahoma might determine it needed to develop upon completion of a "comprehensive water plan" under OWRB's auspices.

22. The Oklahoma Attorney General, relying on S.J. Res. No. 7, quoted above, *inter alia*, issued Opinion No. 77-274 on February 28, 1978 to OWRB's then-acting Executive Director, concluding that Oklahoma law would not countenance an appropriation of water located in Oklahoma by an out-of-state user:

> Considering these factors together, we consider the proposition unrealistic that an out-of-state user is a proper permit applicant before the Oklahoma Water Resources Board. We can find no intention to create the possibility that such a valuable resource as water may become bound, without compensation, to use by an out-of-state user.

Attorney General Opinion No. 77-274 has not been judicially declared invalid or addressed. Under Oklahoma law, Defendants acting in their official capacities as the governing board members of OWRB are required to follow an Attorney General Opinion until a court determines otherwise. *Hendrick v. Walters*, 865 P.2d 1232, 1243 (Okla. 1993); *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906, 909 fn 2 (10th Cir. 2008). Further, Defendants, in their official capacities, as the governing members of OWRB, are

powerless to strike down any of Oklahoma's laws for constitutional repugnancy. *Dow Jones & Co., Inc. v. State ex rel. Oklahoma Tax Com'n*, 787 P.2d 843, 845 (Okla. 1990).

23. Oklahoma's public policy of forbidding acquisition by a nonresident of water in Oklahoma permeates Oklahoma's Anti-Export Laws, which include the following:

a) 82 O.S. (2008 Supp.), §1B and 74 O.S. (2008 Supp.), §1221.A -- a "moratorium" on the sale or exportation of surface water and/or groundwater outside Oklahoma, whether by contract, state or tribal compact, intergovernmental cooperative agreement, *or exportation by any means* -- effective initially for three years from June 6, 2002, then later extended for five years from November 1, 2004 *or until such time as the State of Oklahoma conducts and completes a comprehensive scientific hydrological study of the water resources of this State.*. The legislature has expressly excepted from the Moratorium on water exports industry-related sales of Oklahoma water -- *i.e.*, sales which promote Oklahoma's own commerce. 82 O.S. (2008 Supp.), §1B (C)(2).

b) 82 O.S. 2001, §105.16(B) -- which discriminatorily provides for surface water appropriations exceeding seven years only upon a showing that the proposed use will promote the optimal beneficial use of water "in Oklahoma," thereby preventing appropriation of surface water for a complicated out-of-state use involving lengthy development periods such as meeting municipal long-term needs.

c) 82 O.S. (2008 Supp.), §1085.2(2) -- which forbids the OWRB (governed by Defendants) from making any contract to convey title or use of water outside the State, including to any other state or governmental subdivision of any other state, except by an authorizing act of the Legislature.

d) 82 O.S. 2001, §1085.22 -- which forbids the Oklahoma Water Conservation Storage Commission (whose *ex officio* members are the members of OWRB, Defendants herein), from permitting the sale or resale of any water for use outside Oklahoma, in conjunction with duties imposed upon such Commission relating to the sale, transfer or lease of water storage facilities.

e) 82 O.S. 2001, §1266(9) -- by definition excluding participation of non-Oklahoma political subdivisions in a Regional Water Distribution District under 82 O.S. 2001, §1266 et al., thus depriving such non-Oklahoma political subdivisions of the opportunity and right accorded to Oklahoma subdivisions to, *inter alia*, the acquisition of water rights, and the furnishing, transportation and delivery of water, under 82 O.S. 2001, §1267.

f) 82 O.S. 2001, §1324.10(B) -- which forbids the sale or exportation of water by a water district outside Oklahoma without the consent of the Legislature.

g) House Bill 1483, codified at 82 O.S. 2009, §105.12 & §105.12A and enacted in 2009 while this action was pending, contains both new and amendatory laws adopting additional discriminatory provisions regulating

out-of-state acquisition and use of water located in Oklahoma, and expressly applies to new applications, permit amendments and pending applications before the OWRB.

24. Oklahoma's Anti-Export Laws, which constitute an embargo of water located in Oklahoma, prevent the acquisition of such water by nonresident persons or entities, public and private, conflict with the Red River Compact and additionally have the protectionist purpose and effect of discriminating against interstate commerce in violation of the Commerce Clause.

Oklahoma's Anti-Export Laws Are Unconstitutionally Obstructing Plaintiff's Direct Appropriations Of Water in Oklahoma

25. The Anti-Export Laws, including the Oklahoma Moratorium [82 O.S. (2008 Supp.), §1B and 74 O.S. (2008 Supp.), §1221.A], constitute an unlawful embargo of water resources in Oklahoma. The embargo conflicts with the Red River Compact and is thus preempted under the Supremacy Clause, and discriminates against nonresidents in violation of the Commerce Clause. [Plaintiff acknowledges the Court's November 18, 2009 Order wherein the Court found that the Moratorium expired on November 1, 2009. Because there is ambiguity in the Moratorium statutes and because Oklahoma officials continue to make inconsistent statements as to whether the Moratorium has in fact expired, Plaintiff re-states its claims regarding the Moratorium in this amended complaint until a final disposition of this case is made].

26. The unconstitutional economic protectionist purpose and effect of the Anti-Export Laws is to prevent Texas citizens from acquiring water located in

Oklahoma. Similarly, 82 O.S. 2001, §105.16(B), by prohibiting outright the use of surface water for periods exceeding seven years except for proposed beneficial uses "in Oklahoma," embargoes water resources for the very kinds of out-of-state uses where the water is most needed – to fulfill municipal long-term needs, fulfilled through construction projects requiring lengthy development periods.

27. Plaintiff has filed applications in the OWRB for appropriations from three Oklahoma tributaries: Kiamichi River, Cache Creek, and Beaver Creek (hereafter the "Applications"). The Red River Compact expressly accords Texas an apportionment of and right to water from the Kiamichi River, and the Commerce Clause protects the Plaintiff's right to acquire water from any or all three tributaries. Plaintiff filed this action before filing the Applications to enable it to file, contemporaneously with the Applications, a Motion wherein Plaintiff sought this Court's protection from Defendants' dismissal or denial of the Applications on the basis of the challenged Anti-Export Laws -- an action which would threaten Plaintiff with irretrievable loss of invaluable priority rights, as discussed in the Motion. Thereafter, Plaintiff and Defendants entered into a stipulation, approved by the Court, that Defendants would not take any adverse action upon Plaintiff's Applications until final resolution of this lawsuit, mooting the need for a temporary restraining order or preliminary injunction. *Doc. 15.*

28. On June 1, 2009, nearly 2½ years after this action was filed, and after the affirmance and remand by the Tenth Circuit in Defendants' appeal from this Court's October 29, 2007 Order denying Defendants' motion to dismiss this action, Oklahoma enacted HB 1483 (2009). HB 1483 expressly applies

to pending applications for appropriation of surface water such as those filed by Plaintiff as described in the foregoing Paragraphs 17 and 27 -- and adopts new and amendatory laws with the purpose and effect of perpetuating and expanding Oklahoma's unconstitutional and discriminatory policy against nonresidents' acquisition and use of water located in Oklahoma.

29. An applicant wishing to seriously pursue an appropriation or export of water governed by the OWRB must undertake significant engineering tasks, which include, but are not limited to, a diversion firm yield analysis, routing and easement analysis, infrastructure costing, and terminal storage capacity analysis, as well as the inherent preliminary environmental and legal reviews. All of these efforts require substantial investments of time and money, for which Oklahoma's Anti-Export Laws stand as a continuing deterrent to nonresidents given the uncertain outcome of such efforts under Oklahoma's unlawful embargo. Judicial relief is needed to instill the same standing, fair treatment and certainty into the application process for a nonresident that is now enjoyed by Oklahoma applicants for appropriations.

Oklahoma's Anti-Export Laws Are Unconstitutionally Obstructing Plaintiff's Purchase Of Oklahoma Water Pursuant To Contract With An Oklahoma Municipality Or Permit Holder

30. The Anti-Export Laws prevent Plaintiff from purchasing water in Oklahoma and transporting that water out of state, by prohibiting any permit, enjoining any contract for sale or exportation and barring any compact or intergovernmental cooperative agreement for the exportation of water, on any

terms, without the prior approval of the Oklahoma Legislature. Plaintiff is effectively prevented by the Anti-Export Laws from validly contracting for the purchase of water in Oklahoma.

31. As further detailed below, Plaintiff currently stands willing and able to purchase or transfer water located in Oklahoma, and has identified public and private parties willing to sell and export such water to Plaintiff. Specifically, at this time, Plaintiff has entered into agreements for the sale of groundwater and tribal water, as further detailed below. These agreements are frustrated by the Anti-export Laws which make such sale and exportation of surface or ground water unlawful.

Oklahoma's Anti-Export Laws Are Unconstitutionally Obstructing Plaintiff's Acquisition of Groundwater in Oklahoma

32. Groundwater located in Oklahoma is not governed by or subject to any interstate water compact.

33. Plaintiff intends to secure the right to develop, treat and export groundwater from Oklahoma for use in Texas. Plaintiff has ongoing negotiations with multiple parties for the right to transfer groundwater located in Oklahoma to Texas. As of the date hereof, Plaintiff has entered into an Agreement for the Purchase and Sale of groundwater from an Oklahoma citizen, a copy of which is attached hereto as Exhibit "1."

34. An Oklahoma citizen seeking to transfer groundwater out of state must secure a permit or amendment/change of an existing permit from the OWRB. Charged with the enforcement of Oklahoma law, the OWRB cannot issue this kind of permit under the Anti-export Laws. Oklahoma's prohibitions

on exporting water apply to groundwater and unlawfully discriminate against interstate commerce.

Oklahoma's Anti-Export Laws Are Unconstitutionally Obstructing Plaintiff's Acquisition of Tribal water in Oklahoma

35. Sovereign tribal nations having obtained land and natural resources by treaty or reservation with the United States have federal or Indian reserved water rights in Oklahoma. *Winters v. United States*, 426 U.S. 128 (1976).

36. Surface and groundwater owned by sovereign tribal entities secured by treaty or reservation with the United States is not subject to, and is excluded from governance under, the Red River Compact, as provided in Article II, Section 2.07.

37. In particular, surface waters reserved to tribal entities, such as the Apache Tribe of Oklahoma located in the Cache and Beaver Creek watersheds of Oklahoma, are not governed by, restricted by or otherwise subject to the Red River Compact.

38. The Oklahoma Legislature and Executive branches of government, and in particular the OWRB, lack jurisdiction to limit, restrict, condition or embargo waters reserved to sovereign tribal entities. The Apache Tribe of Oklahoma has reserved rights under treaty with the United States to certain waters tributary to Cache Creek and Beaver Creek, as well as groundwater in Oklahoma.

39. The Apache Tribe is a willing seller and Plaintiff is a willing buyer of federal tribal reserved water in Oklahoma, as evidenced by a Memorandum of Agreement, a copy attached hereto as Exhibit "2."

40. Oklahoma's unconstitutional water embargo thwarts Plaintiff's ability to enter into and consum-

mate transactions for the purchase or export of water from tribal nations.

COUNT I

OKLAHOMA'S ANTI-EXPORT LAWS CONFLICT WITH OKLAHOMA'S OBLIGATIONS UNDER THE RED RIVER COMPACT AND ARE INVALID UNDER THE SUPREMACY CLAUSE

41. The Red River Compact allocates to Texas the right to take water from certain streams segments in Oklahoma. Oklahoma's Anti-Export Laws are inconsistent with that right. The Red River Compact, approved by Congress, has the status of a federal law and the Anti-Export Laws are accordingly preempted under the Supremacy Clause. Plaintiff, a governmental subdivision of the State of Texas, is entitled to seek to appropriate water allocated by the Red River Compact to Texas without obstruction by the preempted Anti-Export Laws.

42. Plaintiff acknowledges the Court's Order of November 18, 2009 disposing of Plaintiff's Supremacy Clause claims. In this amended complaint, Plaintiff re-states the entirety of its Supremacy Clause claims in order to preserve its rights on appeal.

COUNT II

OKLAHOMA'S ANTI-EXPORT LAWS PURPOSEFULLY DISCRIMINATE AGAINST INTERSTATE COMMERCE IN WATER IN VIOLATION OF THE COMMERCE CLAUSE

43. The Oklahoma Legislature and Oklahoma Attorney General have declared the public purpose of Oklahoma is to prevent exportation of its natural water resources. Oklahoma's Anti-Export Laws must be construed and enforced consistent with that declared public policy.

44. Oklahoma's Moratoriums were adopted in response to efforts by Plaintiff and certain Texas municipal water providers to acquire water from Oklahoma and has the protectionist and unconstitutional purpose of preventing Plaintiff from obtaining water from Oklahoma.

45. Oklahoma's Anti-Export Laws facially discriminate with an economic protectionist purpose and are *per se* unconstitutional under the Commerce Clause of the United States Constitution.

46. Plaintiff acknowledges the Court's Order of November 18, 2009 whereby the Court dismissed Plaintiff's Commerce Clause claims as to water subject to the Red River Compact. However, the Order left Plaintiff's Commerce Clause claims intact with respect to non-compacted water. In this amended complaint, Plaintiff re-states the entirety of its Commerce Clause claims in order to preserve its rights on appeal.

COUNT III

THE EFFECT OF OKLAHOMA'S ANTI-EXPORT LAWS IS TO PLACE AN UNDUE DISCRIMINATORY BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE

47. Aside from the discriminatory purpose of Oklahoma's Anti-Export Laws, such laws have the discriminatory effect of preventing acquisition or use by nonresidents of water in Oklahoma except where such acquisition promotes Oklahoma's local commerce (82 O.S. (2008 Supp.), §1B(C)(2)).

48. Oklahoma's Anti-Export Laws are not narrowly tailored to serve a legitimate State interest and no showing can be made of the inadequacy of nondiscriminatory alternatives.

49. The discriminatory effect of the Anti-Export Laws places an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution.

50. Plaintiff acknowledges the Court's Order of November 18, 2009 whereby the Court dismissed Plaintiff's Commerce Clause claims as to water subject to the Red River Compact. However, the Order left Plaintiff's Commerce Clause claims intact with respect to non-compacted water. In this amended complaint, Plaintiff re-states the entirety of its Commerce Clause claims in order to preserve its rights on appeal.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that the Court enter:

(A) a declaratory judgment (i) of the invalidity, under the Red River Compact, and the Supremacy and Commerce Clauses of the United States Constitution, of Oklahoma's Anti-Export Laws, including Attorney General Opinion No. 77-274; and (ii) that given Oklahoma's obligations under the Red River Compact and the Commerce Clause, no adverse action may be taken against Plaintiffs Applications or efforts to purchase or export water in Oklahoma based solely upon the fact that Plaintiff is a nonresident of Oklahoma or seeks to deliver or use the appropriated water outside of Oklahoma.

(B) a permanent injunction forbidding Defendants, the members of both the Oklahoma Water Resources Board and Water Conservation Storage Commission, from enforcing the Anti-Export Laws or abiding by Oklahoma Attorney General Opinion No. 77-274;

(D) an award of costs incurred by Plaintiff in this action; and

(E) such other equitable and legal relief as the Court may find appropriate and just under the circumstances of this case.

Respectfully submitted,

s/ Kevin L. Patrick

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COUNSEL FOR TARRANT REGIONAL WATER DISTRICT

[December 18, 2009]

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

TARRANT REGIONAL WATER DISTRICT, a Texas State Agency,	)	
Plaintiff,	)	
v.	)	Case No. CIV-07-45-HE
RUDOLF JOHN HERRMANN, et al.,	)	
Defendants.	)	

SUPPLEMENT TO AMENDED COMPLAINT

Plaintiff Tarrant Regional Water District supplements its December 18, 2009 Amended Complaint (Doc. No. 135) by adding the following new paragraph 28.1:

28.1. After this Court issued its November 18, 2009 Order, the State of Texas reviewed the Court's Order, the briefs of the parties and the transcript of the oral argument of October 22, 2009. The Texas officials concluded that Defendants have inaccurately represented the position of Texas with regard to water apportioned to Texas by the Red River Compact. The State of Texas has filed an amicus brief correcting Defendants' inaccurate statements about Texas' interpretation of the Compact and any questions as to Plaintiff's authority and standing under Texas law

to effect an appropriation of waters apportioned to Texas in the geographic area of Reach II, Subbasin 5 of the Compact. *See* Doc. 158 (State of Texas's Motion for Leave to File Amicus Curiae Brief and Brief in Support). The State of Texas and Texas Attorney General, construing Texas law, have expressly recognized Plaintiff's authority to seek to acquire for the benefit of Texas citizens water apportioned by the Red River Compact to Texas. The State of Texas and its Attorney General have expressly confirmed herein Plaintiff's authority to "seek out and acquire water that Texas has a right to use;" that "Tarrant Regional, as a lawful applicant for the use of Texas water, possesses a right to acquire water from Reach II, Subbasin 5 that is equal to the right of any lawful user of Oklahoma water;" and that Defendants' administration of Oklahoma's statutes challenged herein conflicts with and is burdening Texas' rights under the Red River Compact. *Id.* Accordingly, as a result of the declaration of authority set forth by Texas, Plaintiff's preemption claims, as they relate to its pending OWRB Applications, are properly before the Court.

Respectfully submitted,

s/Clyde A. Muchmore
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ATTORNEYS FOR PLAINTIFF TARRANT REGIONAL WATER DISTRICT

[February 19, 2010]

RECORD
AND
BRIEFS

No. 11-889

In the Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,

Petitioner,

v.

RUDOLF JOHN HERRMANN ET AL.,

Respondents.

**On Writ of Certiorari to
the United States Court of Appeals
for the Tenth Circuit**

JOINT APPENDIX
VOLUME II

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Petition For Certiorari Filed January 19, 2012
Certiorari Granted January 4, 2013

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AFFIDAVIT

STATE OF TEXAS)
) SS.
COUNTY OF DALLAS)

The undersigned Affiant being sworn upon his oath, deposes and states:

1. I am employed with Kellogg, Brown & Root ("KBR"), a leading global engineering, construction and services company. KBR has been retained by Tarrant Regional Water District ("Tarrant") to provide water resources investigation, planning, infrastructure and hydrology engineering services, as well as civil infrastructure engineering services to Tarrant. Specifically, I am a consulting water engineer working on Tarrant's planned project to appropriate water located at various points in Oklahoma and transport such water for municipal and other uses within the state of Texas ("Oklahoma water project").

2. I have a Bachelor of Science in Civil Engineering from Brigham Young University and a Masters of Science in Civil Engineering from Colorado State University. I am a Registered Professional Engineer in the states of Texas and Colorado.

3. I am familiar with the Oklahoma water project and have provided technical and engineering consulting advice on the project for one year.

4. I have extensively studied and analyzed the physical availability of surface water within the basins supplying the three tributary streams that Tarrant seeks to divert water from, as reflected in the Applications prepared to be submitted to the Oklahoma Water Resources Board ("Applications"). I have reviewed the Applications and have provided significant technical and factual input in the course of their preparation.

5. My findings as to water availability are summarized in a chart dated January 7, 2007, and titled "Summary of Water Availability," a copy attached to this Affidavit. The chart is organized by the three basins Tarrant seeks to appropriate water from, namely, Cache Creek, Beaver Creek and Kiamichi River.

6. In KBR's study, analysis and findings, we utilized the numbers presented by the Oklahoma Water Resources Board ("OWRB") in their own reports and studies as a starting point in determining water available in the relevant watersheds. *See Row 1 of the Summary of Water Availability chart, attached.* From there, we verified stream gage records and hydrologic assumptions and cross checked such with data available from the U.S. Army Corps of Engineers, U.S. Geological Survey and the OWRB. To determine water available to new appropriations, we subtracted out two items from the revised calculations of "naturalized" flow available: (a) the 50-year projected future in-basin water demands for Oklahoma, based on the most recent Oklahoma Comprehensive Water Plan; and (b) all existing active permitted appropriations regardless of whether such appropriations have been put to beneficial use and regardless of historic annual usage.

The numbers we used to define "available" stream flows under Oklahoma law are conservative (i.e. we purposely underestimate the amount of actual real water available), and are reflected in *Row 2 of the Summary of Water Availability chart attached.*

7. Even based on the conservative numbers used to determine "available" flow, Tarrant is applying for only a fraction of the water that is available and that otherwise flows out of Oklahoma and to the Gulf of Mexico unutilized. *See Row 3 of the Summary of Water Availability chart, attached, for volume amounts Tarrant seeks to appropriate from each stream.* In addition, it is important to note that Tarrant only seeks to appropriate water from three basins; Tarrant's applications have no effect on the multitude of other water basins within Oklahoma that continue to be available for use by Oklahoma. According to OWRB published values for available water in Oklahoma's stream systems, there are roughly 30,000,000 acre feet of water available in the 27 river basins in Oklahoma (excluding the main stem of the Red River). The OWRB has also reported that in just Southeast Oklahoma, the six major river basins in this area collectively produce in excess of 6.3 million acre-feet per year, while consumptive uses are less than 2% of that amount. After deducting the approximately 460,000 acre feet of water Tarrant seeks to appropriate by its Applications, the amount of flow remaining in the Red River tributaries – which will be wasted by discharge into the Gulf of Mexico – exceeds 6,000,000 acre feet per year (using OWRB's own numbers and assumptions). This equates to surplus flows of almost thirteen times greater than Tarrant's Application amounts.

8. The main channel of the Red River is degraded with chlorides and salinity to the point of relative economic and practical infeasibility for treatment for domestic and municipal consumption purposes. However, water quality is significantly better and acceptable from a cost effective treatment standpoint on the tributaries from which Tarrant seeks to divert. This is the primary reason Tarrant seeks to appropriate water from the relevant tributaries to the Red River located in Oklahoma instead of directly from the main channel of the Red River forming the border between Oklahoma and Texas.

9. I am familiar with the Red River Compact of 1980 ("Compact") and the various stream segments described in the Compact. I have plotted on a map the coordinates as contained and defined in the Compact, in order to visually illustrate the locations of those coordinates. *See attached Map with "Red River Compact Points."* I have also depicted what is considered "mainstem Red River water" under the Compact; specifically I have depicted on a map the physical description contained in Section 5.05(a) of the Compact. *See attached map.* I have also depicted on a map the physical descriptions contained in Sections 4.02(a) and 4.04(a) of the Compact. *See attached map.*

Further Affiant sayeth not.

Dan Buhman, P.E.

Subscribed and sworn to before me this 8th day of January, 2007, by Dan Buhman.

Witness my hand and official seal.

My commission expires August 7, 2010.

Notary Public

CHRIS B R HOLLOWAY
My Commission Expires
August 7, 2010

SUMMARY OF WATER AVAILABILITY

Parameters	Basin			
	Cache Creek[3]	Beaver Creek	Klamichi River	Total
Total Available Water in Watershed per OWRB Calculations (acre-ft/year)	415,117[1]	183,125	1,825,485	2,423,727
Flow Available to Appropriation based on Revised Hydrologic Analysis, Subtraction of Existing Appropriations, and Subtraction of 50-year In-Basin Demand - per KBR (acre-ft/year)	236,422[2]	133,971[4]	1,767,329	2,137,722
TRWD Permit Application (acre-ft/year)	125,000	25,000	310,000	460,000

Note: Average per capita water usage in the North Texas Region is about 200 gallons per day (including irrigation of lawns and municipal open space). This means that 1 acre-ft/year would serve 4.5 people for one year.

Note: Not all values necessary to calculate flow available to appropriation are shown here.

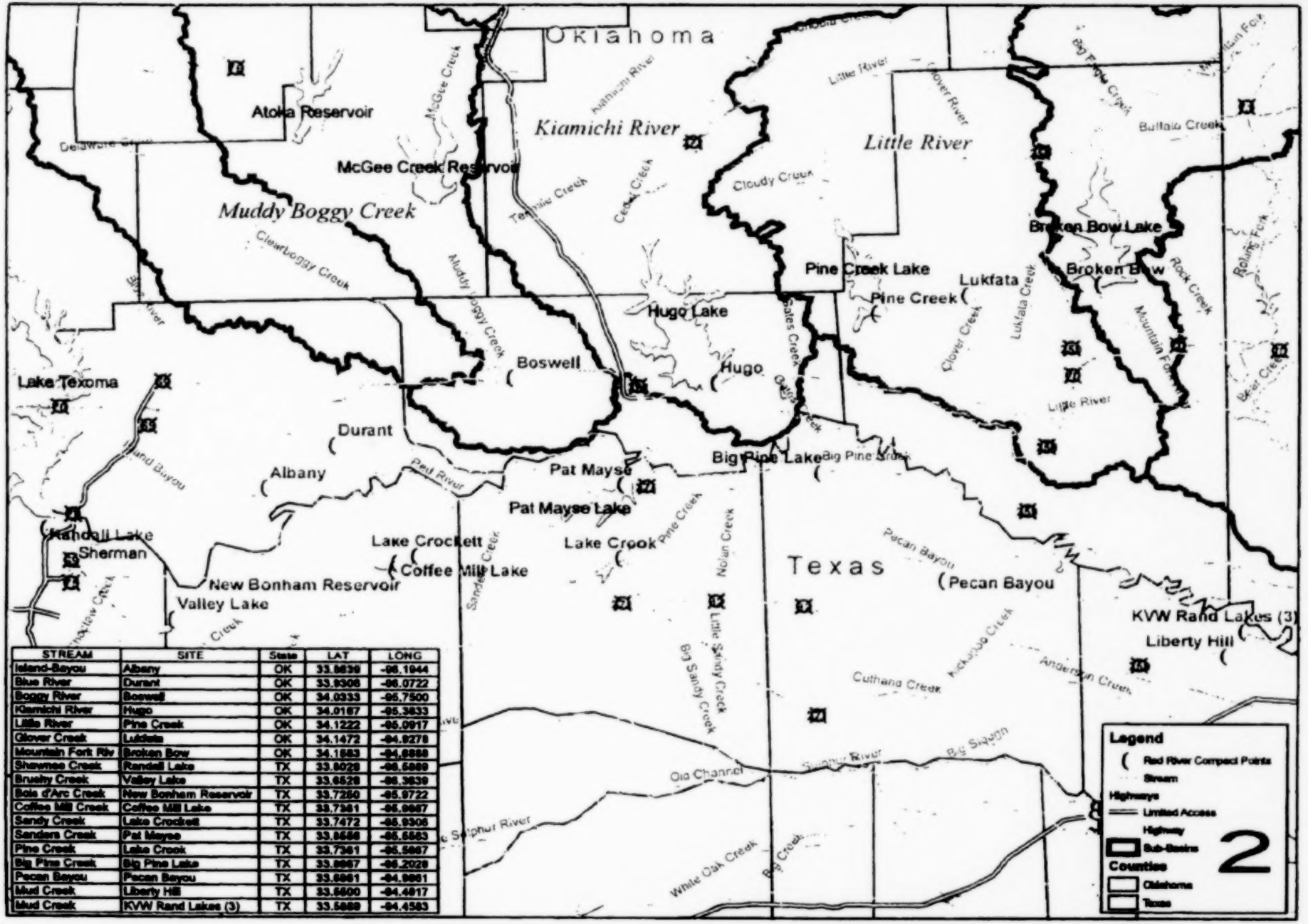
Note: If the OWRB methodology is used, the water available to appropriation is based on an estimated domestic use within each stream system that is equal to 6 acre-ft/yr of use for each 160 acres within the drainage area of the watershed. This would result in the following amounts available: Cache Creek 366,349; Beaver Creek 162,437; Klamichi River 1,781,781

Note (1): OWRB spreadsheet "Stream Available Water 1998.xls" shows 473,772 but uses one erroneous formula. This number represents available water with the formula corrected.

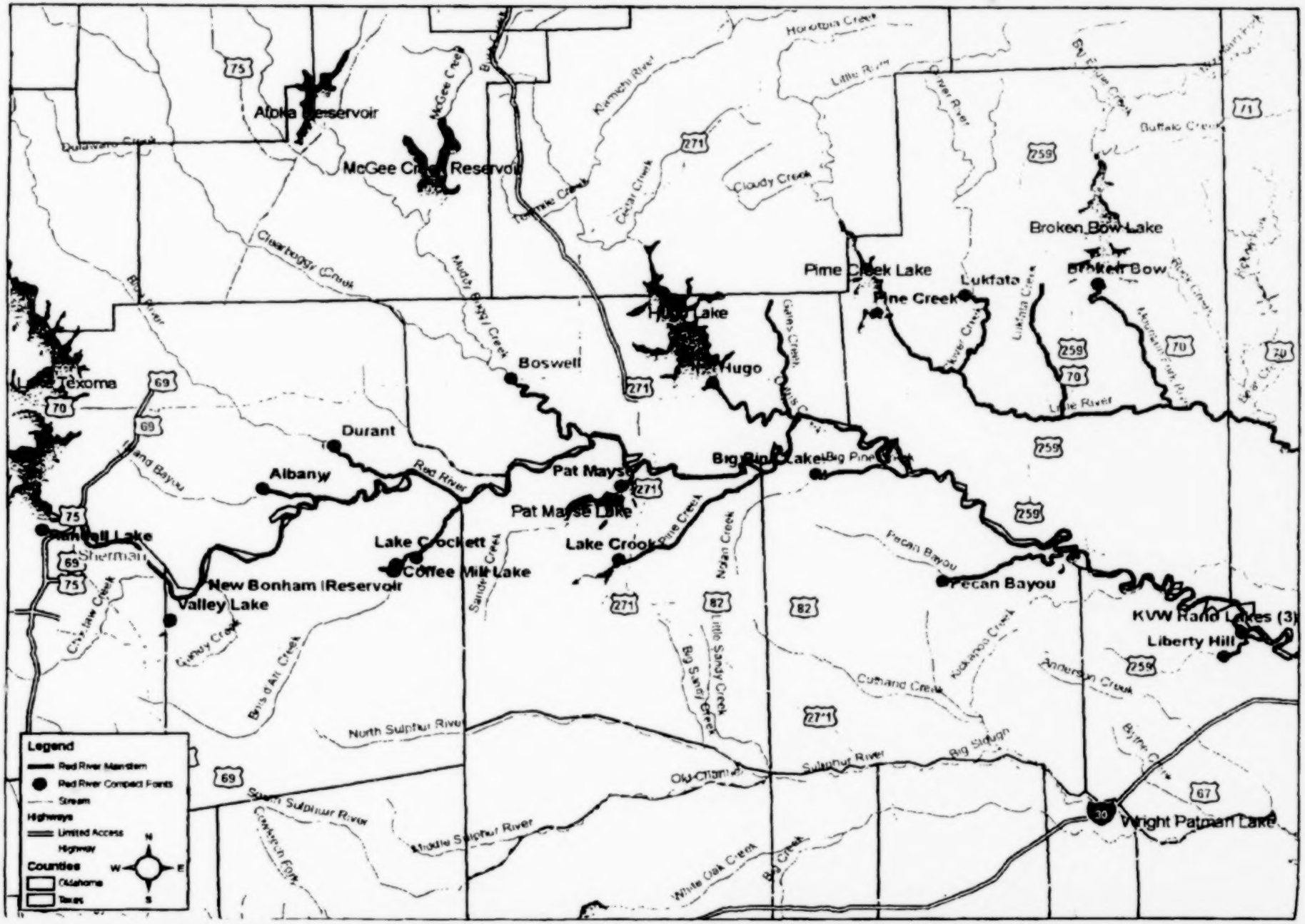
Note (2): If transfers from Lake Waurika (permit 25,000 ac-ft) are included as meeting part of the 50-year demand, this number is 261,422

Note (3): Daily lake levels for lakes in the Cache Creek basin were not available for this analysis. Therefore, it was conservatively assumed that the actual historic yield from the lakes was equal to the "full dependable yield" of these lakes: 65,573 ac-ft/yr (lakes and SCS ponds)

Note (4): KBR calculations resulted in more than OWRB calculated 183,125 ac-ft available in Beaver Creek. To be conservative, KBR assumed that the OWRB calculations govern because they show less water available in the watershed.



STREAM	SITE	State	LAT	LONG
Island-Bayou	Albany	OK	33.8839	-96.1944
Blue River	Durant	OK	33.9306	-96.0722
Boggy River	Boswell	OK	34.0333	-95.7500
Kiamichi River	Hugo	OK	34.0167	-95.3833
Little River	Pine Creek	OK	34.1222	-95.0917
Glover Creek	Lukfata	OK	34.1472	-94.9278
Mountain Fork Riv	Broken Bow	OK	34.1883	-94.6888
Shawnee Creek	Randell Lake	TX	33.8028	-96.5889
Brushy Creek	Valley Lake	TX	33.6528	-96.3639
Bois d'Arc Creek	New Bonham Reservoir	TX	33.7250	-95.9722
Coffee Mill Creek	Coffee Mill Lake	TX	33.7361	-95.6667
Sandy Creek	Lake Crockett	TX	33.7472	-95.9306
Sanders Creek	Pat Mayse	TX	33.8556	-95.5583
Pine Creek	Lake Crook	TX	33.7361	-95.5667
Big Pine Creek	Big Pine Lake	TX	33.6667	-94.2028
Pecan Bayou	Pecan Bayou	TX	33.6861	-94.9861
Mud Creek	Liberty Hill	TX	33.5600	-94.4917
Mud Creek	KWW Rand Lakes (3)	TX	33.5889	-94.4583


Afoka Reservoir
McGee Creek Reservoir
Broken Bow Lake
Broken Bow
Pine Creek Lake
Pine Creek
Lukfata
Hugo Lake
Hugo
Boswell
Durant
Albany
Pat Mayse
Pat Mayse Lake
Big Pine Lake
Big Pine Creek
Lake Crockett
Coffee Mill Lake
Lake Crook
New Bonham Reservoir
Valley Lake
Sherman
Pecan Bayou
KVW Rand Lakes (3)
Liberty Hill
Wright Patman Lake
Red River
Little River
Sulphur River
North Sulphur River
South Sulphur River
Middle Sulphur River
Legend
Red River Mainstem
Red River Compact Points
Stream
Highways
Limited Access Highway
Counties
Oklahoma
Texas
N
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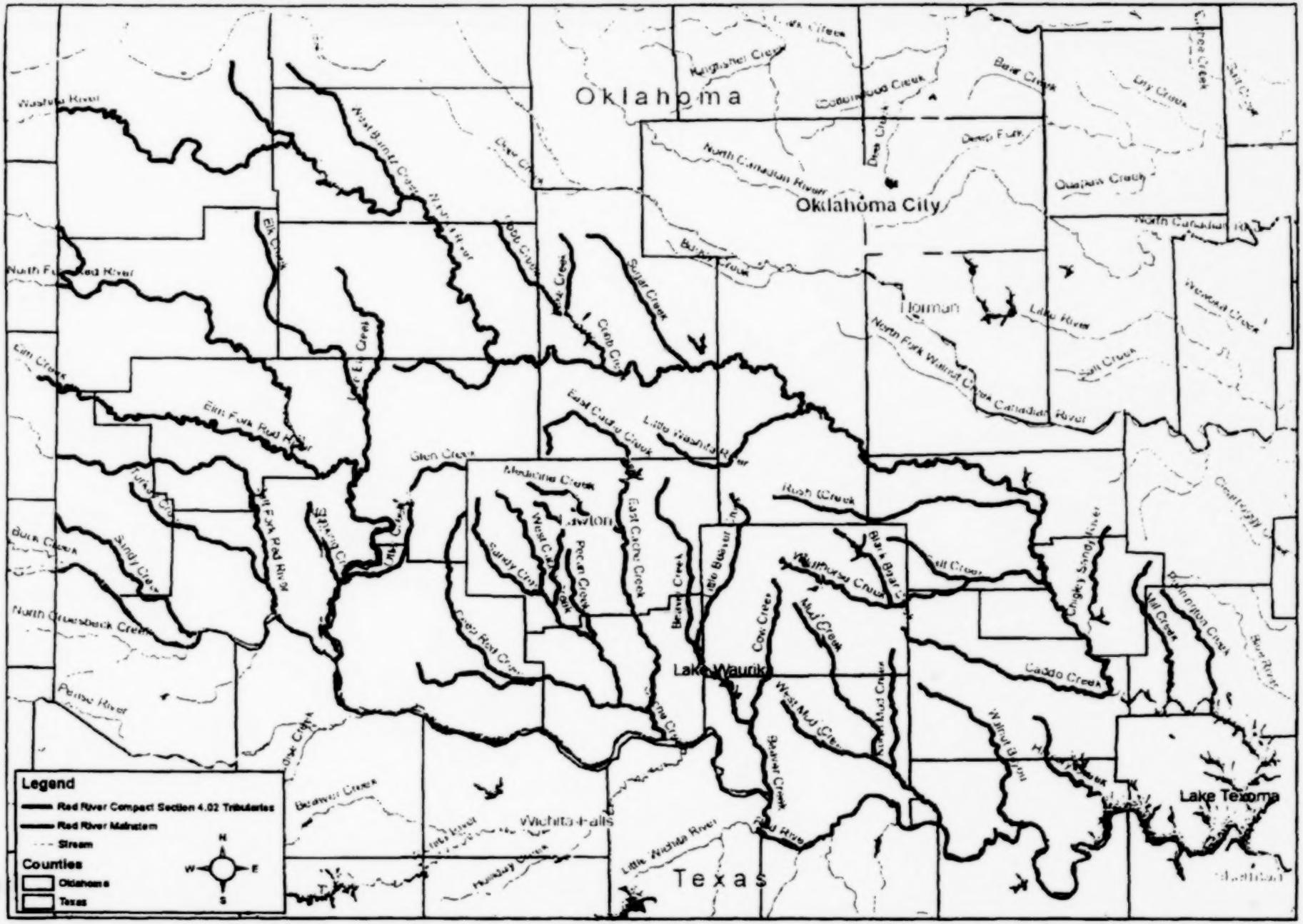

Oklahoma
Oklahoma City
Texas
Lawton
Wichita Falls
Lake Waurika
Lake Texoma
Legend
Red River Compact Section 4.02 Tributaries
Red River Mainstem
Stream
Counties
Oklahoma
Texas
N
W
E
S

APPLICATION FOR A PERMIT
TO USE SURFACE OR STREAM WATER

OKLAHOMA WATER RESOURCES BOARD
3800 N. CLASSEN BLVD.
OKLAHOMA CITY, OK 73118 (405) 530-8800
website: www.owrb.state.ok.us

Office Use Only

Application No._____ Type of Permit _____
Stream System Code _____ Reservoir Code
Hydrologic Unit Code

FILING FEE MUST ACCOMPANY APPLICATION

Amount applied for	Fee
0 - 320 acre-feet	$125.00
321 - 640 acre-feet	$200.00
641 - 1500 acre-feet	$250.00
Over 1500 acre-feet	$250.00

Plus $100.00 for each 500 acre-feet (or any increment thereof) over 1500 acre-feet.
(Maximum Fee $2,000.00)

1. NAME AND ADDRESS

a. Print the applicant's full name and mailing address, complete with zip code. If the applicant is a corporation, use the name and business address of the corporation.

Applicant Name Tarrant Regional Water District **Phone** (___)____-_____
FAX# (___)____-_____

Address See Exhibit "A" please

City_____ State _____Zip _____

b. If the contact during the application process is someone other than the applicant listed above, print the name and mailing address of the contact person.

Contact Name_____ **Phone** (__) ___ _____
FAX#(__) ___-_____

Address _____

City_____ State _____Zip _____

2. TYPE OF SURFACE WATER PERMIT REQUESTED (Check one)

- ☒ **Regular Permit** - authorizes diversion and use of water on a year-round basis.
- ☐ **Seasonal Permit** - authorizes diversion and use of water for specified time periods during the calendar year.
- ☐ **Term Permit** - valid for a term of years and does not vest the holder with any permanent right. (Provide ending date for term permit _____).

DATE OF RECEIPT OF APPLICATION
(FOR OFFICE USE ONLY)

Application # _____

3. AMOUNT OF WATER TO BE APPROPRIATED

State total amount of water applied for in acre-feet per calendar year. One acre-foot of water will cover one acre of land one foot deep and is equal to 325,851 U.S. gallons. The diversion rate is the maximum rate of withdrawal, in gallons per minute, of water from the pond, lake, spring or other definite stream.

Application is made to take and use 310,000 *acre-feet of* surface water annually at a rate not to exceed 694,400 gallons per minute.

4. PURPOSE(S) FOR WHICH WATER WILL BE USED

a. *List the purpose or purposes for which the water would be used if the permit is granted and list the number of acre-feet for each purpose. Be sure that the sum of the amounts listed below equals the total acre-feet in #3 above. If the water is to be used to irrigate crops, list IRRIGATION as the purpose and list the sum total acre-feet for all crops.*

OFFICE USE ONLY
SIC CODES

310,000 acre-feet of water will be used for Municipal, Domestic, Commercial, Industrial, Irrigation, & all other beneficial uses

_____ acre-feet of water will be used for _____

_____ acre-feet of water will be used for _____

_____ acre-feet of water will be used for _____

b. *If the water requested is for irrigation purpose, state the total number of acres that will be irrigated. The land to be irrigated must be shown on plat(s) attached to the application. The amount of water requested should be based on types of crops to be grown and cropping patterns proposed. The Board will use appropriate publications and information the applicant submits in determining amount of water needed.*

_____ acres of land are proposed to be irrigated. The proposed crops are _____

_____

5. DIVERSION(S) OF WATER: Source, Location and Method of Diversion

a. *If the water is to be used in a pond, lake or reservoir and will not be pumped or moved from one location to another, check here.* ☐

b. *For each diversion point, state the amount of water, in acre-feet, to be diverted annually and give the legal description to the nearest ten (10)-acre tract. Also show the point(s) of diversion on the plat, as shown on the sample provided. If you are applying for more than one diversion point, then a photocopy of Section 5 shall be filled out completely for each additional diversion point and attached to the application. If the water is to be used in a pond, lake or reservoir and will not be pumped or moved from one location to another, then use the location of the dam or spillway as the point of diversion.*

310,000 acre-feet of water will be diverted from: See Exhibit "B".

N ☐ EIM ☐

___1/4 of ___1/4 of 1/4 of Sec._____ Twp. _____ S ☐ Rge._____ WIM ☐ in _____

ECM ☐ County

(1) *If the water will be taken from a stream or spring, enter the stream or spring name. If the stream or spring is unnamed, enter as tributary of a named stream, such as "Unnamed tributary of Wolf Creek."*

Direct diversion from stream: Kiamichi River, a tributary of the Red River.

Name of Stream

Application #_____

(2) If the water will be taken from a Soil Conservation Service (S.C.S.) Detention Reservoir, enter the number of the site and the watershed name:

S.C.S. Site No. N/A Watershed Name N/A

(3) If the water will be taken from some other public or private reservoir, enter the name of the stream dammed and name of the reservoir if available. If the stream is unnamed, enter it as a tributary of a named stream, such as "Unnamed tributary of Wolf Creek."

Name of reservoir N/A on _____
Name of Stream

Reservoir is ☐ Existing (Date completed _____) ☐ Under Construction ☐ Planned

Storage of the reservoir: _____ acre-feet Average water depth: _____

Surface acres: _____ Yield: _____

(4) Method of Diversion:
If by gravity, enter the size and carrying capacity of the main canal or conduit and the size of headgate.
If by pump, enter the size, type and number of pumps, kind and horsepower of engine or motor, inlet and outlet size and the maximum capacity of each pump, in gallons per minute.

Method of diversion will be by: ☐ Gravity _____
Size, etc.

☒ Pump Diversion Structure, Pump and Pipeline. See Exhibit "C"
Size, Type of pump, etc.

(5) Do you own or lease the land on which the point of diversion will be located? ☐ Yes ☐ No *If available, attach a copy of the deed, lease, etc. showing the right to use the point of diversion. If not available, the permit, if issued, will contain a condition requiring submittal of a copy of the right before water use begins.*

(6) Will water lines cross public right-of-ways or another landowner's property? ☐ Yes ☐ No *If yes, attach a copy of the easement. If not available, the permit, if issued, will contain a condition requiring submittal of a copy of the easement before water use begins.*

6. LEGAL DESCRIPTION OF AREA OF USE

a. ***Describe the legal description of the area of use below. Please do not use lots or blocks but convert to the nearest legal description. Also show this area on a plat as shown on the sample attached. Your local ASCS or NRCS office may provide you with an aerial photograph of your land. (Municipal and rural water entities refer to #8 below).***

See Exhibit "D".

_____acres_____ 1/4_____ 1/4 of Sec. _____ Twp._____	N ☐ S ☐ Range_____	EIM ☐ W IM ☐ ECM ☐	of	_____ County
_____acres_____ 1/4 _____ 1/4 of Sec. _____ Twp._____	N ☐ S ☐ Range _____	EIM ☐ W IM ☐ ECM ☐	of	_____ County
____ acres_____ 1/4_____ 1/4 of Sec. _____ Twp. _____	N ☐ S ☐ Range _____	EIM ☐ WIM ☐ ECM ☐	of	County
____acres _____ 1/4 _____ 1/4 of Sec. _____ Twp. _____	N ☐ S ☐ Ranoe	EIM ☐ WIM ☐ ECM ☐	of	_____ County

b. FOR IRRIGATION ONLY Do you own or lease this land? ☐ Yes ☐ No *If yes, attach a copy of the deed or lease. If no, application should be made by the owner or the permit, if issued, will require that a deed or lease be submitted before use of water begins.*

Application #_____

7. **PLATS A plat must be completed and submitted with the application showing the following:**
   a. *The information requested in items 4b, 5 and 6 of this form.*
   b. *The appropriate location and extent of the proposed storage and diversion works.*
   c. *The location of the headgate, intake, pumping plant and point of diversion.*
   d. *The course and name of river, stream or other source of water.*
   e. *The position and area of all lakes, reservoirs or basins intended to be used or created, and the water lines thereof,- and*
   f. *All other ditches, canals, conduits, laterals, lakes or reservoirs (or other works or improvements affected) which the proposed works will intersect, or with which connection will be made.*
   See Exhibit "B".

8. **JUSTIFICATION OF PRESENT AND FUTURE NEED**
   a. ***Irrigation** - Completion of #4b. serves as justification of need for amounts requested for irrigation.*
   b. ***Municipal and rural water entities** - Submit population projection figures and all other methodologies, calculations, and additional information used to determine amount of water requested. Submit a map of the municipal or rural water entity boundaries or service areas and the water line locations. The map must show points of reference or scale.*
   c. ***Industrial, Commercial and Agriculture (non-irrigation)** - Submit methodology, calculations, and additional information used to determine amount of water requested.*
   See Exhibit "D" – "G".

SIGNATURES The application must be signed as follows:
   a. *If the applicant is an individual, the application shall be signed by the applicant, or his duly appointed agent who shall present evidence of authority to act as agent with the application.*
   b. *A joint application shall be signed by each applicant or his duly authorized agent, provided that a joint application by husband and wife may be signed by either party. (Joint applicants are required to select one among them to act for and represent the others in dealing with the Board.)*
   c. *If the application is by a partnership, the applicant shall be designated by the firm name followed by the word "a Partnership," and the application shall be signed by each of the general partners or, if signed by one partner or other agent, a written statement of that person's authorization to make the application, signed by the other parties in interest, shall be attached to the application.*
   d. *In the case of an estate or guardianship, the application shall be signed by the duly appointed guardian or representative of the estate, and a certified copy of the letters issued by the court shall be attached to the application.*
   e. *In the case of a water district, count, municipality, etc., the application shall be signed by a duly authorized official, and a certified copy of the resolution or other authorization to make the application shall be attached.*
   f. *In the case of a private corporation, the application shall be signed by a duly authorized person and , if not attested by the secretary or assistant secretary, a copy of the authorization shall be attached to the application;*

An attorney duly licensed to practice law in Oklahoma may sign an application for an applicant he or she represents. The Oklahoma Bar Association number must be indicated.

Subscribed and sworn before me this 9th day of January 2007

Paula Rene' Tarbutton
Notary

My commission expires on: 10/5/07
(seal)

I swear and verify that the above information is true and accurate to the best of my knowledge, and that I will comply with all applicable laws and regulations of the State of Oklahoma.

Signature of Applicant

James M. Oliver
Print Name

General Manager
Title (If applicable)

NOTARY SEAL PUBLIC
PAULA RENE' TARBUTTON
Oklahoma County
Notary Public in and for
State of Oklahoma
Commission # 99018440 Expires 10/5/07

Application #_____

APPLICATION SUBMISSION AND PROCESSING

To be deemed complete, the submitted application must include:

a. *The appropriate filing fee.*
b. *The original application, typed or printed in ink, signed and notarized.*
c. *Plat(s) showing the information requested in items #4b, #5, #6, #7 and #8 above and as otherwise instructed on this form.*
d. *Deed(s), lease(s), and /or letter(s) of consent, if available.*

When the application is deemed complete, you will receive instructions about publishing notice of the application in a newspaper. If a proper protest to your application is received, a hearing will be scheduled. After the protest period and hearing if required, the application will be presented to the Board for consideration. Application processing time is about 60 to 90 days. You may apply for a provisional temporary permit which is effective for up to 90 days if you have an immediate need for water.

If you believe that within the first seven (7) years after issuance of your permit you will not be able to use the full amount of water applied for, please contact Board staff.

EXHIBIT A: Paragraph 1b, Contact List

APPLICANT:

Tarrant Regional Water District
James Oliver, General Manager
Wayne Owen, Planning Director
800 East Northside Drive
Fort Worth, TX 76102
Tel: 817-335-2491
Fax: 817-877-5137

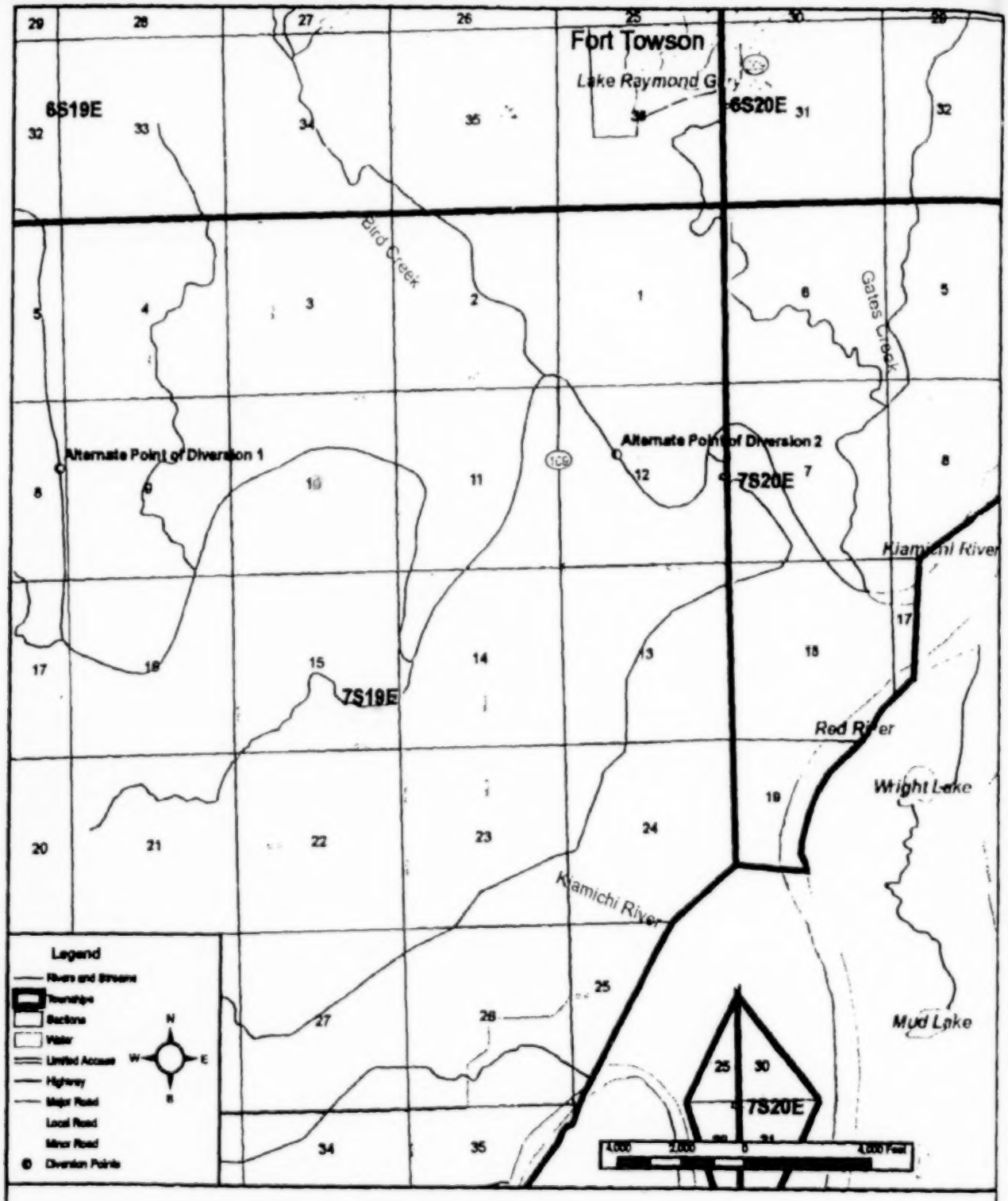
PRIMARY CONTACTS FOR APPLICATION:

ENGINEERS:

KBR
Dan Buhman, Project Engineer
1444 Oak Lawn Ave.
Suite 100
Dallas, TX 75207
Tel: 214-752-8300
Fax: 214-752-8366
Email: Dan.Buhman@halliburton.com

ATTORNEYS:

Patrick, Miller & Kropf, PC
Kevin Patrick, Esq.
730 East Durant Avenue, Suite 200
Aspen, CO 81611
Tel: 970-920-1028
Fax: 970-925-6847
Email: patrick@waterlaw.com



Alternate Point of Diversion	Legal Description	Section	Township	Range	Meridian	County
1	NE,SE,NE	8	7S	19E	IM	Choctaw
	1,975 ft from the North Section Line and 200 ft from the East Section Line					
2	SW,SE,NW	12	7S	19E	IM	Choctaw
	1,670 ft from theWest Section Line and 2,020 ft from the North Section Line					
Prepared By: KBR Date: December 2006						
Title: Engineer						

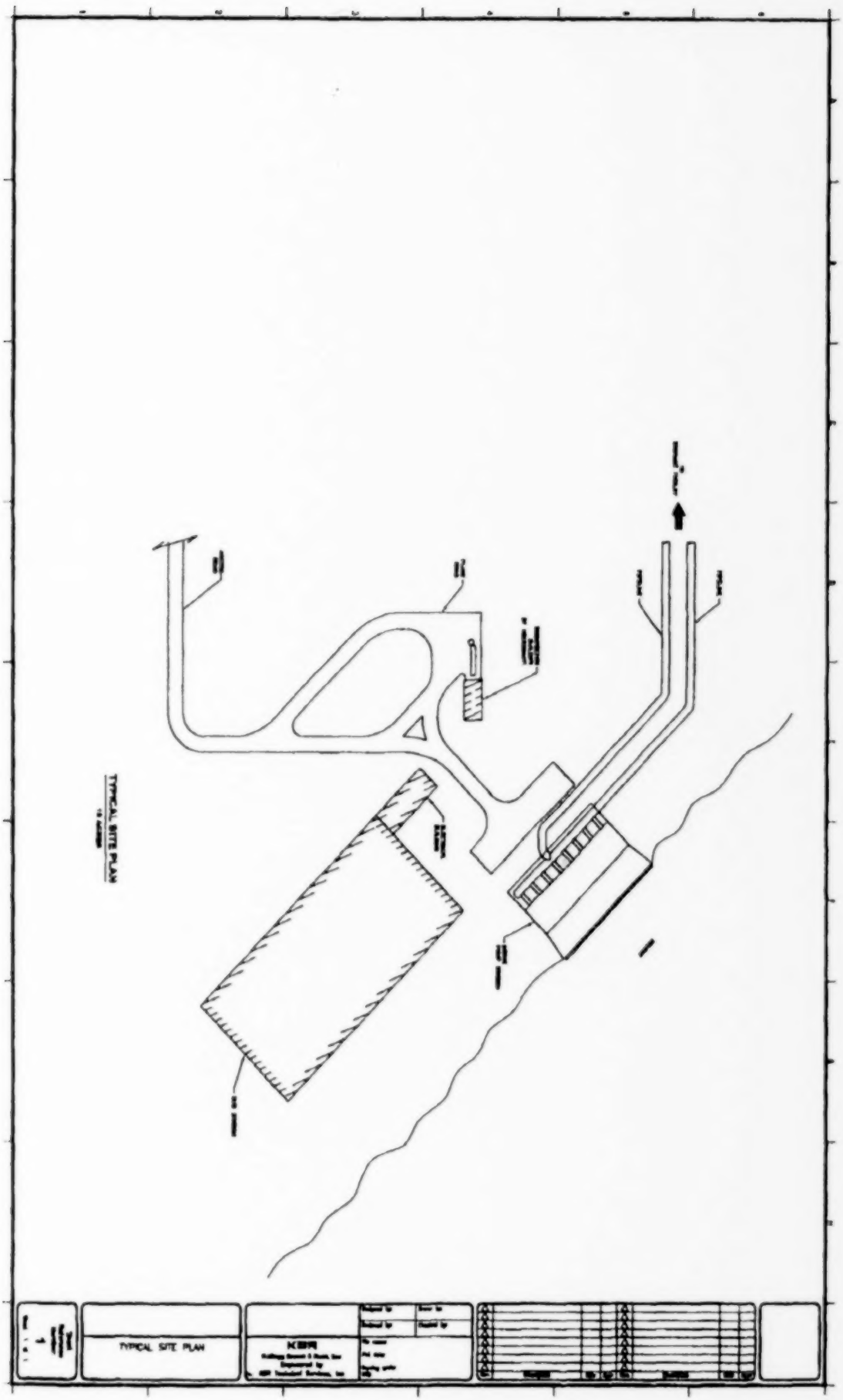
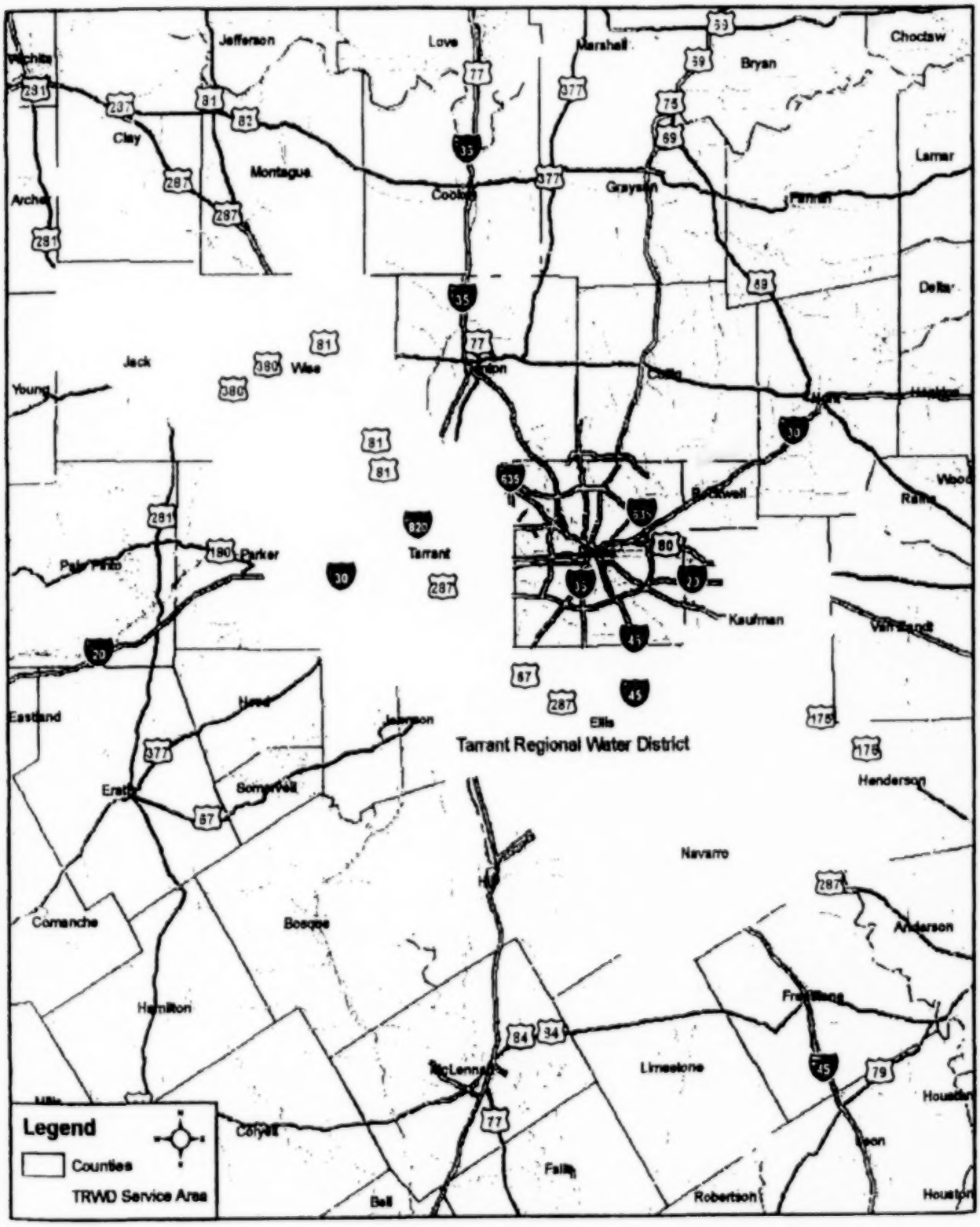

TYPICAL SITE PLAN
TYPICAL SITE PLAN
KBR

EXHIBIT D: Paragraph 6, Legal Description of Area of Use

Tarrant Regional Water District (TRWD) is a political subdivision of the State of Texas providing water to over 30 public water providers in the North Central Texas Area, including the cities of Fort Worth, Arlington, Mansfield and the Trinity River Authority. The area of service includes 11 counties within the Dallas-Fort Worth Metroplex. A legal description of the 11 Counties is as follows:

Denton County, Texas
Ellis County, Texas
Freestone County, Texas
Kaufman County, Texas
Henderson County, Texas
Jack County, Texas
Johnson County, Texas
Navarro County, Texas
Parker County, Texas
Tarrant County, Texas
Wise County, Texas

A map of the 11 County service area is attached.



Area of Use

County: Ellis, Henderson, Jack, Johnson, Kaufman, Navarro, Parker, Tarrant, Wise

State: Texas

Prepared by: Kellogg Brown & Root Date: July 21, 2006

Title: Engineer

EXHIBIT E:
Paragraph 8, Justification of Present and Future Need

TRWD has engaged in comprehensive long range utility planning to assess its demands through the year 2060. In conjunction with that activity, TRWD reviewed all census and local planning jurisdiction databases to determine the expected demands. These included municipal, special district, county, state, and Council of Government and Federal Bureau of Census databases. In addition, TRWD has investigated the yield of all of its other water resources and water projects and has determined that demands exceed projected firm year water supplies within the planning period.

One component of the planning review process was the Region C 2006 Plan presented to the Texas Water Development Board. That report, which was the culmination of over five years of effort by 16 Counties and over 30 water providers, specifically identified acquisition of water within Oklahoma as a recommended source and strategy for the Applicant.

The water demands, in acre-feet, for the Applicant TRWD within the planning period are identified as:

2010	2020	2030	2040	2050	2060
428,966	518,976	595,992	678,304	779,509	893,510

Population projections identified for the Applicant TRWD's service area within the planning period are identified as:

2010	2020	2030	2040	2050	2060
2,373,151	2,814,728	3,220,677	3,647,099	4,159,624	4,745,815

A detailed explanation of County projected population within the planning period for the service area of Applicant is attached. Population projections within the counties existing within the service area of the Applicant during the planning period is anticipated to range between 100-200+ percent over current populations (see Table 2.1 attached).

A summary of the Applicant TRWD's Average Year Available Water Supplies and Demands within the planning period are identified as:

TRWD	2010	2020	2030	2040	2050	2060
Currently Available Supplies	447,036	436,439	425,841	415,243	404,646	394,049
Supplies from All Preferred Strategies[1]	96,209	195,436	217,137	233,418	249,528	268,558
Projected Demands	428,966	518,976	595,992	678,304	779,509	893,510
Surplus or Shortage	114,279	112,899	46,986	-29,643	-125,335	-230,903
Surplus or Shortage with Carryover Storage Contingency	0	0	0	-59,286	-250,670	-461,806

Consistent with customary utility planning, Applicant TRWD plans for carryover capacity to meet drought demands with water supplies available during average or wet climatic conditions. Because Applicant's planning is based on a firm yield condition and the OWRB's planning is based on average annual flow conditions, a factor of two (2) is applied to the Shortage values to account for the demand for carryover capacity available during the average condition from a supply in Oklahoma. This factor ensures that adequate water supplies will be available during a period of drought and supplied, as much as possible, during periods of higher annual flow.

[1] Non-preferred or expected strategies based on cost-prohibitive project costs, possible permitting restrictions or environmental impediments to project feasibility. Marvin Nichols at 140,000 in year 2030-2040 and 280,000 in year 2050-2060; Toledo Bend Project at 100,000 in years 2050-2060.

EXHIBIT F:
Paragraph 8, 50 Year Demand Projection

1. INTRODUCTION

In evaluating new applications to appropriate and transfer surface water, the OWRB considers a 50-year projection of water needs in the basin-of-origin. The Oklahoma Comprehensive Water Plan (OCWP), adopted in 1995, includes water demand projections for all water use sectors through 2050. The projections are developed at a county level and are presented for each of eight water planning regions.

Because the OCWP projects water demands on a county level, a modification must be made to project demands within each watershed; demands are apportioned based on the estimated population of each county that lies within the watershed. For example, if 10 percent of a given county's total population resides within the watershed, then it is assumed that 10 percent of the total county demand also occurs within the watershed. For this analysis, population projection information from US Census Bureau/Oklahoma State Data Center-Oklahoma Department of Commerce was used to estimate the percentage of each county's population that resides within the individual watershed.

There are two types of population categories for each county in the population projection data. One category is for population centers within a county and the other is for the unincorporated county area. The population projection numbers for the population centers in each watershed were directly obtained from the census data source mentioned above. The population projection for the unincorporated area in the watershed in a county is estimated based on the percent of the population within municipal boundaries which lies within the drainage area of the watershed. The population projection for the unincorporated area is obtained by multiplying that percentage by the total population projected for the unincorporated area of that county.

1.1. KIAMICHI RIVER

Table 1.1-1 presents total water demand for 17 counties, nine are in the OWRB East Central Planning Region and eight are in Southeast Region; the Kiamichi River watershed traverses both of these regions. In 2050, projected East Central regional water demands for municipal and industrial uses are 63,000 acre-feet per year (58 mgd) and projected agricultural water demands are 40,000 acre-feet per year (37 mgd). In 2050, the projected Southeast regional water demands for municipal and industrial uses are 105,500 acre-feet per year (97 mgd) and projected agricultural water demands are 45,100 acre-feet per year (41 mgd).

Table 1.1-2 tabulates population projections for each county within the Kiamichi River watershed, and Table 1.1-3 shows the results of calculating the water demand within the watershed based on population within the watershed.

Table 1.1-1 OCWP Water Use Projections

COUNTY/REGIONAL TOTAL WATER USE							
WATER USE PROJECTIONS IN KIAMICHI RIVER BASIN							
1990-2050							
	YEAR						
PLANNING REGION & COUNTY	1990	2000	2010	2020	2030	2040	2050
EAST CENTRAL REGION							
Haskell	4	4.1	4.2	4.3	4.4	4.5	4.5
Hughes	15.3	15.9	16.7	17.3	17.8	18.3	18.7
Latimer	3.2	3.4	3.5	3.7	3.7	3.8	3.9
LeFlore	16.3	17.6	18.7	19.3	20	20.7	21.5
McIntosh	6.1	6.5	6.7	6.8	6.9	7.1	7.4
Okfuskee	4.5	4.7	4.8	5	5.1	5.2	5.4
Pittsburg	11.6	12.3	12.7	12.9	13.3	13.8	14.2
Seminole	29.3	35.2	42.1	50.3	60.1	72.3	87
Sequoyah	11.5	12.7	13.9	14.4	14.8	15.5	16
Total	101.8	112.5	123.3	134	146.1	161.2	178.6
SOUTHEAST REGION							
Atoka	5.3	6.5	7.7	8.7	9.6	10.7	11.6
Bryan	19.6	21.1	22	23	23.5	24.5	25.3
Choctaw	10.1	11.6	13.3	15.4	17.5	19.9	22.8
Coal	4	4.6	4.9	5.2	5.7	6	6.2
Johnston	5.5	5.8	6.2	6.5	6.7	7.1	7.5
McCurtain	53.4	56.5	63	67.9	69.1	69.8	70.4
Pontotoc	13.9	16	16.2	16.5	16.8	17.2	17.5
Pushmataha	3.9	4.2	4.4	4.5	4.6	4.8	5.1
Total	115.7	126.4	137.6	147.7	153.5	160	166.5
GRAND TOTAL	217.5	238.9	260.9	281.7	299.6	321.2	345.1

Table 1.1-2 Kiamichi River Watershed Population Projection by County from 2000 through 2050

KIAMICHI RIVER WATERSHED
POPULATION PROJECTION FROM 2000 THRU 2050

	YEAR						
County	2000	2010	2020	2030	2040	2050	% of County
Choctaw County	15,342	15,600	16,000	16,300	16,627	16,948	
Fort Towson	611	620	640	650	668	683	
Hugo	5,536	5,630	5,770	5,880	6,000	6,116	
Sawyer	274	280	290	290	298	304	
Unincorporated	3,279	3,336	3,421	3,481	3,556	3,625	
Total	9,700	9,866	10,121	10,301	10,522	10,728	63.25%
% of County	63.23%	63.24%	63.26%	63.20%	63.28%	63.30%	
Le Flore County	48,109	51,500	55,500	59,100	62,703	66,352	
Talihina	1,211	1,300	1,400	1,490	1,581	1,674	
Unincorporated	526	564	608	647	686	726	
Total	1,737	1,864	2,008	2,137	2,267	2,400	3.62%
% of County	3.61%	3.62%	3.62%	3.62%	3.62%	3.62%	
Pushmataha County	11,667	13,000	14,700	16,300	17,741	19,260	
Albion	143	160	180	200	217	236	
Antlers	2,552	2,840	3,220	3,570	3,884	4,217	
Clayton	719	800	910	1,000	1,095	1,189	
Rattan	241	270	300	340	368	399	
Unincorporated	2,510	2,796	3,164	3,508	3,820	4,147	
Total	6,165	6,866	7,774	8,618	9,384	10,189	52.87%
% of County	52.84%	52.81%	52.89%	52.87%	52.89%	52.90%	
Atoka County	13,879	15,500	17,400	19,300	21,056	22,882	
Unincorporated	575	642	721	799	872	947	
Total	575	642	721	799	872	947	4.14%
% of County	4.14%	4.14%	4.14%	4.14%	4.14%	4.14%	
Latimer County	10,692	11,000	11,500	12,100	12,403	12,831	
Unincorporated	1,520	1,562	1,635	1,720	1,763	1,824	
Total	1,520	1,562	1,635	1,720	1,763	1,824	14.21%
% of County	14.21%	14.20%	14.22%	14.21%	14.21%	14.21%	
Pittsburg County	43,953	45,300	47,400	49,200	50,747	52,446	
Unincorporated	1,020	1,051	1,100	1,142	1,178	1,217	
Total	1,020	1,051	1,100	1,142	1,178	1,217	2.32%
% of County	2.32%	2.32%	2.32%	2.32%	2.32%	2.32%	
Total Watershed	20,716	21,852	23,359	24,717	25,986	27,305	

Table 1.1-3 Kiamichi River Watershed Demand Projections Using County-Watershed Population Proportioning

KIAMICHI RIVER WATERSHED
PROJECTED WATER USE IN 1000 AF BY POPULATION

	YEAR						
COUNTY	2000	2010	2020	2030	2040	2050	% of County
Choctaw County	7.3	8.4	9.7	11.1	12.6	14.4	63.25%
LeFlore County	0.5	0.6	0.6	0.6	0.7	0.7	3.62%
Pushmataha County	2.2	2.3	2.4	2.4	2.5	2.7	52.87%
Atoka County	0.27	0.32	0.36	0.40	0.44	0.48	4.14%
Latimer County	0.48	0.50	0.53	0.53	0.54	0.55	14.21%
Pittsburg County	0.29	0.29	0.30	0.31	0.32	0.33	2.32%
Total Watershed	11.13	12.43	13.92	15.37	17.09	19.19	
Percent Change from Year 2000	0.00%	11.69%	25.03%	38.11%	53.51%	72.41%	

From the above analysis, the water demand projection will be approximately 19,200 acre-ft/year in 2050. As a point of comparison, existing permitted surface water rights in the Kiamichi River watershed are 83,409 acre-ft/year.

As a comparison of projected growth in water usage to projected growth in population, the OCWP population projections of percent change in population per 5 years are tabulated in table 1.1-4. This comparison shows that the growth in water demand is much higher than the projected growth in population.

Table 1.1-4 Kiamichi River Watershed Percent Change in Population

KIAMICHI RIVER WATERSHED
PERCENT CHANGE OF POPULATION

	YEAR						
County	2000	2005	2010	2015	2020	2025	2030
Choctaw County	0.00%	0.43%	1.71%	2.95%	4.34%	5.73%	6.20%
Le Flore County	0.00%	3.22%	7.35%	11.48%	15.61%	18.91%	23.04%
Pushmataha County	0.00%	5.35%	11.37%	19.31%	26.10%	32.95%	39.79%
Pittsburg County	0.00%	1.27%	3.07%	5.35%	7.85%	9.89%	11.93%
Atoka County	0.00%	5.22%	11.65%	18.88%	25.41%	31.85%	39.08%
Latimer County	0.00%	0.99%	2.82%	4.78%	7.58%	10.38%	13.18%
Total Watershed	0.00%	2.21%	5.20%	8.77%	12.20%	15.55%	18.59%

From the above analysis, the water demand projection will be approximately 19,200 acre-ft/year in 2050. As a point of comparison, existing permitted surface water rights in the Kiamichi River watershed are 83,409 acre-ft/year.

1.1.1. KIAMICHI RIVER STREAMFLOW ALLOCATIONS

As a comparison of OCWP projections to existing records kept by the Oklahoma Water Resources Board (OWRB), the OCWP projections of allocated water in the Kiamichi River watershed have been compared with actual records of active allocations from the database kept by the OWRB. Table 1.1-5 lists the stream water allocations projections by the OCWP for counties in the Kiamichi River watershed.

Table 1.1-5 OCWP Stream Water Allocations Projections for Counties in Kiamichi River Watershed

WATER RIGHTS
EAST CENTRAL AND SOUTHEAST PLANNING REGIONS
STREAM WATER ALLOCATIONS
(acre-feet)

COUNTY	Municipal	Industrial	Agricultural	Commercial	Rec, F&W	Power	Other	TOTAL
Pittsburg County	35,406	21309	5,652	30	1	0	0	62,398
Atoka County	140,309	12,000	3,267	0	139	285	0	156,000
Latimer County	4,405	60	911	30	483	0	0	5,889
Pushmataha County	13,908	0	2,190	0	258	0	0	16,356
Choctaw County	30,500	0	6,349	0	290	32,000	0	69,139
Le Flore County	6,788	15,357	8,510	169	615	0	0	31,439
TOTAL	231,316	48,726	26,879	229	1,786	32,285	0	341,221

Note: Agricultural allocations include Irrigation. Mining included in Industrial.
Source of data: Oklahoma Water Resource Board printout, June 23, 1994.

To compare the OCWP allocation calculation with the OWRB allocations database, it was again necessary to apportion the OCWP allocations to the Kiamichi River Watershed. Table 1.1-6 represents the results based on population proportioning.

Table 1.1-6 Kiamichi River Watershed Allocations Using County-Watershed Population Proportioning

KIAMICHI RIVER PORTION OF STREAM WATER ALLOCATIONS
BASED ON PERCENTAGE OF COUNTY POPULATION IN KIAMICHI WATERSHED
STREAM WATER ALLOCATIONS
(acre-feet)

COUNTY	Municipal	Industrial	Agricultural	Commercial	Rec, F&W	Power	Other	TOTAL	% of County
Pittsburg County	822	495	131	1	0	0	0	1,448	2.32%
Atoka County	5,810	497	135	0	6	12	0	6,459	4.14%
Latimer County	626	9	129	4	69	0	0	837	14.21%
Pushmataha County	7,353	0	1,158	0	136	0	0	8,647	52.87%
Choctaw County	19,293	0	4,016	0	183	20,242	0	43,735	63.26%
Le Flore County	245	555	308	6	22	0	0	1,137	3.62%
TOTAL	34,149	1,555	5,878	11	417	20,254	0	62,263	–

From the analysis shown above, the OCWP calculation of approximately 62,260 acre-feet allocated to the Klamichi River is approximately 75% of the OWRB database estimate of approximately 82,400 acre-feet allocated (based on only active permits). Actual usage in the past 15 years has never risen above 10,000 acre-feet/year.

EXHIBIT G: Availability of Alternatives

Applicant has conducted on-going planning and exploration of alternatives since the 2001 Texas Regional Water Planning effort. Since that time it has explored and pursued several alternatives, some of which have proven viable and others have not.

The alternatives identified as potentially available to the Applicant TRWD consist of:

Conservation: Applicant has accepted and is pursuing best practical conservation measures. Savings to the Applicant by this alternative are incorporated in the supply estimates provided herein. Conservation savings are estimated at 79,793 acre feet per year by 2060.

Reuse: Applicant has recently received a permit from the Texas Commission on Environmental Quality allowing diversion of effluent return flows from the Trinity River. The water will be pumped into constructed wetlands and then delivered to Richland-Chambers Reservoir and Cedar Creek Reservoir. The total water supply made available by the reuse project within the study period is 115,500 acre feet per year and those supplies are incorporated within the demand and supply projections stated herein.

Cross-Connection of Existing Infrastructure: Applicant is pursuing the Eagle Mountain Connection to convey the Applicant's eastern-most reservoirs to Eagle Mountain Reservoir on the West Fork of the Trinity River. This act will increase system efficiencies and redundancy but will not materially increase overall system yield. However, additional yield from these eastern-most reservoirs (Richland-Chambers and Cedar Creek) will increase overall system yield by 73,265 acre feet per year within the study period.

Marvin Nichols Reservoir: The 2006 Region C Water Plan identified this project as having high environmental costs, high agricultural/rural adverse impacts and high Third Party adverse impacts. This project is less economically favorable than a supply from Oklahoma and includes some degree of uncertainty because it is not an existing reservoir.

Toledo Bend Reservoir: The 2006 Region C Water Plan identified this project as having medium environmental costs, low agricultural/rural adverse impacts and medium/low Third Party adverse impacts. However, all water developed by such a project would be pumped over 200 miles and over 300 feet of elevation. Energy costs and capital costs are perceived to render this project very expensive and therefore less economically favorable in comparison to a supply from Oklahoma.

Oklahoma Alternative: The 2006 Region C Water Plan identified this project as having high reliability, low environmental costs, low agricultural/rural adverse impacts and medium/low Third Party adverse impacts. Because water would be taken immediately above the confluence of the Red River and after the

COPY

MINUTES OF TWENTY-FOURTH MEETING

RED RIVER COMPACT COMMISSION

DALLAS, TEXAS, January 17-18, 1962.

The twenty-fourth meeting of the Red River Compact Commission was called to order by the Chairman at 10:00 a.m., January 17, 1962, in a conference room of the Southland Hotel, Dallas, Texas. The following were present:

Members of Compact Commission:

Henry C. Beckman, Federal representative and Chairman.
Buster Cole, representative of Texas.
Guy H. James, representative of Oklahoma
Calvin T. Watts, representative of Louisiana.
Leonard N. White, representative of Arkansas.

Members of Engineering Advisory Committee:

R. M. Dixon, representative of Texas and Chairman of Committee; and Ivan M. Stout, alternate representative.
Daniel V. Cresap, representative of Louisiana; and Cecil K. Oakes, alternate representative.
Forrest Nelson, representative of Oklahoma.

Members Also of Subcommittee on Stream Pollution Control:

Fred Simpson, representative of Oklahoma.

Members of Legal Advisory Committee:

Homer J. Belanger, representative of Louisiana.
Russell Wools, alternate representative of Arkansas.

Others:

Joe Carter, Chairman, Texas Board of Water Engineers, Austin, Texas.
Jack Holt, Jr., First-Assistant Attorney General, and Jack Lessenberry, Assistant Attorney General, Little Rock, Arkansas.
Kenneth D. McCall, Interior Southwest Field Committee, Muskogee, Oklahoma.
Warden L. Noe, State Board of Agriculture, Topeka, Kansas.
Forrest O. Swiggart, Corps of Engineers, Southwestern Division, Dallas, Texas.
E. J. Williams, Jr., Corps of Engineers, Lower Mississippi Valley Division, Vicksburg, Mississippi.

The minutes of the twenty-third meeting of the Commission were approved.

The scheduled review of the recently revised draft of compact (dated 1-21-61) was postponed until the next meeting of the Commission so that Richard M. Huff, Chairman of the Legal Advisory Committee, could be present, because he had prepared and distributed that draft.

The Chairman reviewed briefly the provisions in the draft of compact dated 1-21-61 for the control of interstate stream pollution, and the desire of the Compact Commission to have authorized to be tried in the Federal district courts any lawsuits regarding pollution control that might arise under the contemplated compact. He passed out copies of bill H.R. 6717, 87th congress, 1st Session, which had been introduced by Congressman Harris of Arkansas, and which would authorize holding such suits in the Federal district courts and provide for the venue thereof. The Chairman also gave a resume of the testimony presented at a hearing on this bill before Subcommittee No. 3 of the House Committee on the Judiciary. At that hearing, the following actions took place:

1. Congressman Harris explained the purpose of the bill.

2. The Department of Justice presented a letter dated July 11, 1961, stating that the Department had no objection to the general purpose of the bill, but recommended that lines 15 to 19 of page 2 (these being Subsection b of Section 1) be stricken from the bill because they might be construed by the courts as enabling a State to sue its own citizens.

3. David Warner of the Department of Justice made an oral statement endorsing the general purpose of the bill, but upheld the stand taken by the Department of Justice regarding lines 15 to 19 of page 2, as mentioned above.

The Chairman then called attention to a letter dated August 11, 1961, from Richard M. Huff to Buster Cole in which Mr. Huff gave his reasons for desiring to keep Subsection b of Section 1 in bill H.R. 6717 and presented information to uphold his view that this subsection would not be construed by the courts to authorize a State to sue its own citizens. Mr. Huff's letter continued:

> "However, if the members of the Red River Compact Commission desire to agree to a concession in this regard, it would be my personal suggestion that the objection of the Justice Department be met, if possible, <u>not</u> by striking any of the present language of the bill but rather by <u>adding</u> a proviso to Subsection (b) of Section 1 in substance <u>as follows</u>: 'Provided, that nothing in this Act shall be construed as authorizing a State to sue its own citizens in said courts'."

The members of the Compact Commission requested the Chairman to write to Congressman Harris commending him for his efforts to get bill H.R. 6717 passed and that the Commission endorsed the recommendation of Mr. Huff referred to above. The Chairman will do this and send a copy of his letter to each member of the Commission.

The Chairman then distributed copies of a pamphlet which contained the recently approved Delaware River Compact, which had been obtained by Calvin T. Watts. The Chairman called attention to paragraph "p" on page 45 of the pamphlet which states in the consent legislation of the Congress that:

"The United States district courts shall have original

jurisdiction of all cases or controversies arising under the compact and any case or controversy so arising initiated in a State court shall be removable to the appropriate United States district court in the manner provided by 1446, Title 28 U.S.C.***."

A discussion of this provision in the Delaware River Compact followed. The opinion was expressed that it would serve as a precedent for including a similar provision in the Congressional consent legislation for the contemplated Red River Compact. The concensus of opinion, however, was that it would be preferable to obtain this feature through the passage of bill H.R. 6717.

R. M. Dixon presented an oral progress report on the accomplishments of the Engineering Advisory Committee since the last meeting of the Commission. He said that the committee had concerned itself mainly with water problems and allocations on the Red River below Denison Dam. After a satisfactory solution regarding this area is achieved by the four States, Texas and Oklahoma can devote their attention to the problems and allocations above Denison Dam, which should be less difficult. He read a written statement which outlined 12 points, or basic principles, on which the committee had reached general agreement. He said that he will furnish to the members of the Commission a written statement of these 12 points after he makes some editorial improvements in the language used therein.

Mr. Dixon also described the media being tested by the Corps of Engineers to reduce the natural deterioration of the water in some streams due to the inflow of very salty water from some sources. He said that the Corps is to make a written report on this subject.

Buster Cole introduced Joe Carter, Chairman of the Texas Board of Water Engineers, who had just arrived. Mr. Carter said that he was present to observe the activities of the Commission and said he felt that Texas was ably represented in the negotiations. The Chairman told Mr. Carter that the Commission would welcome his attendance at the meetings whenever it would be practicable for him to come.

The meeting was recessed at 12:30 p.m., and reconvened at 2:00 p.m.

Guy H. James said he believed that the operation of the Broken Bow hydroelectric plant on Mountain Fork would make a substantial contribution to the maintenance of low flows at points downstream to meet the requirements of Arkansas and Louisiana, but owing to the fact that several other reservoirs on tributaries to the Red River will probably be built in the future (which also will augment the low flows) he felt that the Broken Bow reservoir should not be mentioned specifically in the contemplated compact as an important source of enlarged low water flow. The other members of the Commission concurred in this view.

Forrest O. Swiggart of the Southwest Division Office, Corps of Engineers, said that the Broken Bow hydroelectric plant would be used as a peak-load plant and that the released flows would be re-regulated at a small dam about 7 miles downstream. The releases from the re-regulating reservoir will probably range between about 800 and 2,000 cubic feet per second during Mondays to Fridays and be at a minimum of about 200 cubic feet per second during week-ends. He said that these fluctuations would be flattened out somewhat farther through natural storage in the 18 miles of river channel between the re-regulating reservoir and the Arkansas-Louisiana State line, including the Millwood Reservoir. He

could not predict the extent to which operation of the Millwood Reservoir would affect the variation in flows, but he believed that any effect would be on the side of averaging out the flows and reducing the variations -- thus increasing the low flows at the Arkansas-Louisiana State Line.

Buster Cole said that he would like to have the Engineering Advisory Committee prepare and submit a suggested method of allocating the waters of the Red River Basin among the four states. Members of the committee replied that they had been working on such a task for several months and that they would continue to do so.

The meeting was recessed at 4:00 p.m. and reconvened at 9:00 a.m. the next day (18th).

The morning session opened with a general discussion of the historical low flows of Red River at the Index, Arkansas, gaging station and at the Arkansas-Louisiana State line. Members of the Engineering Advisory Committee said that they had unanimously accepted the following figures as representing those historical low flows:

Number of Consecutive Days	Average Historical Low Flows in Cubic Feet Per Second: At Index, Arkansas Gage	At Ark-La State Line
1	384	650
7	397	670
30	469	800
90	710	1,200

Calvin T. Watts said that Louisiana asks to be assured in the compact that the low flows at the Arkansas-Louisiana State line be not reduced below those figures in the future. Guy H. James said he felt that this request by Louisiana is reasonable. In the following discussion the thought was presented and accepted that, if this goal is to be met, the obligation of the upstream states to provide these minimum flows at the Arkansas-Louisiana State line should be on the basis of the percentage of the Red River watershed between Denison Dam and the Arkansas-Louisiana State line which lies within the respective states, as follows:

Texas-34%; Oklahoma-47%; Arkansas-19%.

R. H. Dixon said that, although the Engineering Advisory Committee had accepted the above figures regarding the historical flows and tributary drainage areas as being correct, they had not yet reached agreement on all details as to how these low flows could be provided during severe droughts. Guy H. James repeated his view that the request of Louisiana for getting low flows not less than the historical low flows at the Arkansas-Louisiana State line was reasonable, but he did not believe that the upstream states could carry out their responsibility to provide such flows until further storage developments are made upstream. Calvin T. Watts said he realized that a more severe drought could occur than any that had been recorded in the past, and that this could conceivable produce lower flows than any which had previously been recorded. He said that the upstream states could not be expected to agree to provide low flows at the Arkansas-Louisiana State line as great as the historic

low flows during such unprecedentedly severe droughts. Mr. Watts said further that in order to assure reasonable action by the three upstream states during such extremely severe droughts, the contemplated compact might state that those states would not permit or authorize any additional uses of water which would have the effect of reducing the flows at the Arkansas-Louisiana State line below the historic low flows, as enumerated above. This provision would be similar to one in the Sabine River Compact between Texas and Louisiana.

Mr. Dixon also said that the Engineering Advisory Committee, in consultation with David F. Smallhorst, had reviewed those portions of the draft of compact dated 1-21-61 which relate to the control of stream pollution and the natural deterioration of waters. He read a number of revisions which the committee suggested. A copy of these suggestions was then furnished to the Legal Advisory Committee, who will study them and report thereon at the next meeting of the Commission.

Guy H. James suggested, and the other commissioners concurred, that the Chairman should write a letter to the District Engineer, Corps of Engineers, Tulsa, endorsing the study now being made by the Corps as to means for reducing the natural deterioration of waters in the Red River Basin due to the inflow of heavily salt-laden waters in some localities, including experimental construction work to ascertain the effectiveness of possible remedial measures. The Chairman said that he would so write to the District Engineer, and send copies of his letter to the members of the Commission.

The members of the Engineering Advisory Committee agreed to meet at the Southland Hotel in Dallas beginning at 9:00 a.m. March 8 and concluding about noon the next day for the purpose of furthering the major task assigned to them by the Commission of making a tentative recommendation for allocating the waters of the Red River Basin among the four States.

After some discussion with members of the Commission and its committees, Homer J. Belanger agreed to write to Richard M. Huff about holding a meeting of the Legal Advisory Committee in Oklahoma City in the near future in order to consider and make recommendations regarding some of the subjects that have been referred to that committee.

The next meeting of the Commission and its committees is to be held at the Captain Shreve Hotel in Shreveport, Louisiana, beginning at 2:00 pm April 24 and concluding about 4:00 p.m. the next day (25).

The meeting was adjourned at 10:45 a.m.

DRAFT
OF
TRANSCRIPT OF THIRTY-FOURTH MEETING
RED RIVER COMPACT COMMISSION
VICKSBURG, MISSISSIPPI
1-2 APRIL 1965

RECEIVED
MAY 12 1965
TEXAS WATER COMMISSION
AUSTIN, TEXAS

1. Opening of meeting. The thirty-fourth meeting of the Red River Compact Commission was called to order by the Chairman, Major General Ellsworth I. Davis, at 3:00 P.M., 1 April 1965, in the Conference Room, Mississippi River Commission, Vicksburg, Mississippi.

2. Attendance. Members, representatives, and guests that were present at the meeting are shown on Incl 1.

3. The following is a transcript of the meeting:

GENERAL DAVIS: Well, it is certainly very nice to have you here in Vicksburg. It is a rather difficult place to get to, as most of you appreciate, but once you get here, I think you will find out it is well worthwhile.

With respect to our business at hand here, if you will recollect, we decided that we would have Texas and Oklahoma get together this afternoon with particular reference to Reach 2 so that if there is any possibility of arriving at something - we would try to do that before getting comments from the Committee as a whole, meeting on all of the reaches.

MR. CLARK: I might add that I have copies of the minutes of the thirty-third meeting for reference, if anyone doesn't have one. That will be pretty much the take-off point. Mr. James, do you need one?

(Distribution of copies of minutes)

MR. CLARK: I might add that you will notice the little bug hanging down here in the middle of the room. We are making a tape of this meeting.

GENERAL DAVIS: Well, what we are here for today is to find out if Texas and Oklahoma have been able to come to any sort of a meeting of minds with regard to Reach 2, and if not, wherein the lack of agreement lies - the lack of information or something else which could be looked into. I thought we might start upstream and work down. Mr. McKinney, would you start the ball rolling on this?

MR. MCKINNEY: General, we do have a statement. We had to make some changes in it and we are attempting to get the statement typed. It is being typed upstairs now. This includes the results of some of our studies we think would be very helpful. We regret that the editing work we did this morning hacked it up pretty badly. We thought it would be helpful to have it copied as we had a single copy to start with.

GENERAL DAVIS: I gather that Oklahoma hasn't seen this.

MR. MCKINNEY: No. They have been advised of the studies but haven't seen the draft.

GENERAL DAVIS: Well then, would any purpose be served by asking Oklahoma if there is anything they would like to say at this time? Or would you prefer to wait? Mr. James?

MR. JAMES: We haven't been exactly idle on this thing. I've been in communication by telephone. As of now, I have not had any information other than the information that is shown here in these minutes. So, at this time there is no change until we see the statement which there is some possibility of entering into an agreement on that basis - why, of course, we can go ahead when we have a statement at hand. Let me suggest that we go to the dam and - disregard everything upstream from the dam - and see if we can slip out agreements on everything below the dam.

GENERAL DAVIS: When you talk about dam, do you mean Denison?

MR. JAMES: Yes, Denison. While we are waiting on this statement to be typed and have a chance to look at it, let's presume that we will both be able to make an understanding in any event of agreements we made below Denison Dam.

GENERAL DAVIS: Does that pertain to the two states?

MR. JAMES: That pertains to all of the states. Everybody's here.

GENERAL DAVIS: Well, we can start off with Reach No. 1, if you wish.

MR. JAMES: Let's go down to 5.

GENERAL DAVIS: 5 is all right.

MR. VANDERTULIP: General, may I interrupt? As a matter of procedure, at the last meeting we discussed the possibility of having statements at this meeting of the views and understandings of each state

on these various proposals. We do have them. While we do not want to take too much time, whatever sequence we take these reaches, we feel it would be appropriate for each state to express its views.

GENERAL DAVIS: I am in agreement to discuss in any order you wish. I believe you have selected No. 5 because that is the place where we don't seem to have any agreement. All right. Well, let's go into Reach No. 5. According to the way we left it the last time was that Louisiana, Texas, and Arkansas were to meet on the 19th of February to develop a revised proposal which was to be sent to all the Commissioners and Federal representatives. As far as I know, we have received no information on the meeting. Have the states met since our last meeting?

MR. VANDERTULIP: The States of Texas and Louisiana met in reference to Cypress Bayou and most of the time was spent, in Oklahoma City, in discussing the lower reach of the bayou. Basically, we spent our time on Cypress Creek.

MR. CRESAP: I might say that Arkansas was there, but a week ahead of time.

MR. FRANCIS: That sounds bad - but what happened was - I was there at the agreed upon time and they changed the date while I was en route.

GENERAL DAVIS: Well, let's go back to 5. On 5, is there any sort of an agreement that the two or three states have worked out that they would like to throw out on the board here?

MR. MCKINNEY: We did make some few changes from the last proposal on that, Mr. Chairman. If you would like, we can read our statement here.

GENERAL DAVIS: All right. This pertains to Reach 5?

MR. MCKINNEY: Yes, sir. (Then reads the following statement)

STATEMENT

REACH 5

Red River from Denison Dam to Arkansas-Louisiana State Line
(Texas-Oklahoma-Arkansas-Louisiana)

In this reach numerous proposals have been made during the more than 8 years of compact negotiations. The proposal shown below embodies some of the provisions that Louisiana has stated were necessary to arrive at a compact. This proposal would appear to be an equitable basis for a compact.

1. The States of Arkansas, Oklahoma and Texas shall have the free and unrestricted use of the waters from that part of a tributary of the Red River lying within each respective State above any dam now constructed or that may be constructed in the future.

2. Maintenance of a minimum flow in Red River at the Arkansas-Louisiana State Line shall be provided for as necessary by releasing from the reservoirs in the Red River Basin below Denison Dam, and including Lake Texoma, a total of not more than 200 cfs whenever the rate of flow at the Arkansas-Louisiana State Line is less than 1,000 cfs. The States of Arkansas, Oklahoma, and Texas shall be responsible for their proportionate share of the releases on the following percentages of the flow requirement of up to 200 cfs:

Arkansas	19 percent
Oklahoma	47 percent
Texas	34 percent

3. All waters released or spilled on any tributary of the Red River below Denison Dam from the most downstream dam now constructed or that may be constructed in the future on that tributary and all waters released or spilled from Lake Texoma, shall not be diverted before said water passes the Arkansas-Louisiana State Line, except that: (a) any water released or discharged from storage in a reservoir which has been paid for or purchased by a State or local interest shall remain the property of said State or local interest and said entity shall have the use of this water; and (b) each of the states of Arkansas, Oklahoma, and Texas shall have the right of depletion by beneficial use of flows of the Red River in the amounts of 150,000 acre-feet by Arkansas, 150,000 acre-feet by Oklahoma, and 150,000 acre-feet by Texas, subject to maintaining the minimum flows described in paragraph 2, hereinabove.

Texas interprets the language of paragraph 1 to mean that water from reservoir projects, existing or future, located on tributaries in Texas can be used at the discretion of Texas in the Red River Basin or in other basins in Texas.

The releases of up to 200 cfs set forth in paragraph 2 were developed on a drainage area basis. Each of the 3 states would have an option of which reservoirs to make releases from during the very small percentage of time that such releases were necessary.

The uses of water permitted under paragraph 3(b) would be subject to first maintaining the minimum flows described in paragraph 2.

Louisiana's position includes the following provisos to be added to paragraph 3:

(Mr. McKinney said here: "We were just pointing out our understanding of what has gone on before on 'provisions'".)

"the provision that water removed from the main stem of the Red River below Denison Dam shall not be exported from the Red River Basin; and the provision that the rate of removal of water from the Red River by each State shall not exceed ____ cubic feet per second."

Texas cannot make proper usage of its water supplies or meet its State-wide water requirements without provision of transbasin diversion from the Red River Basin. It cannot agree to any prohibition on transbasin diversion.

A limitation on diversion rates is unrealistic as industrial cooling water purposes would be precluded from use. These once-through diversions for cooling purposes usually have a very large diversion rate and a very minor depletion.

MR. MCKINNEY: We had hoped to get our statement typed and ready for distribution. As I have said, we had to make some changes, particularly in Reach 2, and are at the present time having that retyped.

GENERAL DAVIS: Do you have typed statements of Reach 5 that you just read off there?

MR. MCKINNEY: Yes, sir.

GENERAL DAVIS: Essentially, it looks to me to be very much the same as we have in our minutes. You are giving your divergence of opinion from Louisiana.

MR. MCKINNEY: Of course, we did put in the change on "that part of a tributary of the Red River lying within each respective state above any dam now constructed or that may be constructed in the future" taking out and changing the part that referred to a Federal dam or reservoir.

GENERAL DAVIS: I wonder if you don't have copies of that, could we have your printed copy there so we could run it off on the machine?

MR. FRANCIS: In subparagraph (b), it reads, "Each of the States of Arkansas, Oklahoma, and Texas shall have the right of depletion", in this retype, and here it reads "diversion".

GENERAL DAVIS: You changed the word "diversion" to "depletion", didn't you?

(Side discussions of changes)

MR. CLARK: May I ask a question, John and Leighton? In this first paragraph, "The States of Arkansas, Oklahoma, and Texas shall have the free and unrestricted use of the waters from that part of a tributary of the Red River lying within each respective State above any dam now constructed or that may be constructed in the future." Now we have considered Reach 5, as also including in consideration of , 6 and 7. Now in the case of Reach 6 where you have Millwood on a stream that would comply with this last part - any dam constructed. Would your interpretation mean that you would have the right for all the Little River water above the State line, or Oklahoma would?

MR. VANDERTULIP: Well, as we have pointed out in our previous statement on the Sulphur River reach in the tentative agreement that Texas and Arkansas had arrived at, that that would be subject to this Reach 5. In other words, the provisions that we arrived at there would be subject to Reach 5. Now we feel that the Little River reach should also be subject to whatever comes under Reach 5, so whatever is arrived at for Reach 6 and 7 is going to have to dovetail into Reach 5.

MR. CLARK: This was the question that was brought up at one of the meetings.

MR. VANDERTULIP: Now there is one significant difference than what you had before - what we have in paragraph 1 in Reach No. 5, and that is the word "in" changed to "from". Now the word "in", as we understand it, means that we can only use the water within the Red River Basin. It is Texas' position that this can be "in" the Red River Basin or outside of the Red River Basin; hence, we use the word "from".

GENERAL DAVIS: Well, actually we have in our minutes from the last time - for Reach No. 5 - we have what you just read, Mr. McKinney, with some changes. I wonder if it would be helpful if we would turn to page 4 of our minutes of our last meeting for Reach 5, and for you to indicate the changes that you have made and the reasons therefor. I think it would probably help us in knowing what you have in mind. As I understand, what we had in here before was a combination of Texas wording plus the Louisiana wording. So, if we could go down our draft of Reach 5 here as it is in the minutes, with you telling us where you have crossed out or added or changed, it would help us. As I gather it, in paragraph 1, he changed "in" to "from" on the second line. Right? On the third line you struck out the word "subtributary". Anyone else?

MR. VANDERTULIP: The latter phrase "or now authorized for construction by the Federal Government in the respective state on any tributary or subtributary" was struck and the language inserted "or that may be constructed in the future".

GENERAL DAVIS: "The Red River lying within each respective state above any dam now constructed or that may be constructed in the future."

MR. VANDERTULIP: As it was in the minutes of the last meeting, it would preclude the Federal Government from having any additional projects authorized - saying "now authorized" means no future authorization. Second, there would be the possibility of non-Federal projects; such as, industrial, off-channel projects, which is a district possibility, or small cities wanting water, and we think that that should not be precluded.

GENERAL DAVIS: Then this paragraph ends with the word "future", is that right? Then your paragraph 2 is pretty much the same. I don't see any change in it.

MR. VANDERTULIP: I believe that is exactly the same.

GENERAL DAVIS: Paragraph 3.

MR. CLARK: In line 3, you deleted "authorized by construction by the Federal Government" and inserted "that may be constructed in the future".

MR. VANDERTULIP: Incidentally, your secretary is making extra copies of our Reach No. 5 statement.

GENERAL DAVIS: By going over this we will emphasize what you've changed.

MR. CLARK: The next change I have is the word "diversion" to "depletion".

GENERAL DAVIS: About midway down in paragraph 3. Then you deleted the (2) and (3) statements in paragraph 3.

MR. VANDERTULIP: That's correct.

GENERAL DAVIS: For the reason that you gave, I presume now that this is Texas' proposal. Does any state want to respond to this?

MR. CRESAP: I also have prepared an Alteration of Proposal for Reach 5 with our discussion and comments on what we think this means.

GENERAL DAVIS: Do you have anything that we could read along with you on this?

MR. CRESAP: Yes.

(Mr. Cresap distributed copies of the proposal and discussion.)

MR. CRESAP: This is the proposal on Reach 5, and the first one there is very little change, if any, to what was proposed before.

PROPOSAL

REACH 5
Red River Between Denison Dam and
the Arkansas-Louisiana State Line

1. The States of Arkansas, Oklahoma, and Texas shall have the free and unrestricted use of the waters in that part of a tributary or subtributary of the Red River lying within each respective state above any dam now constructed or to be constructed (and I am beginning to see that "now authorized" would sorta' restrict us, so that is the one change we didn't make). Now our - "constructed or to be constructed by the Federal Government in the respective state and on that tributary or subtributary". And in parenthesis we are putting as a flag (Restrictions or agreements to protect the authorized operation of Federal projects shall be set forth elsewhere in the Compact). (Item 2 was - if I remember - almost, well exactly the same as it was.)

2. Maintenance of a minimum flow in Red River at the Arkansas-Louisiana State Line shall be provided for as necessary by releasing from the reservoirs in the Red River Basin below Denison Dam, and including Lake Texoma, a total of not more than 200 cfs whenever the rate of flow at the Arkansas-Louisiana State Line is less than 1,000 cfs. The States of Arkansas, Oklahoma, and Texas shall be responsible for their proportionate share of the releases on the following percentages of the flow requirement of up to 200 cfs:

Arkansas	19 percent
Oklahoma	47 percent
Texas	34 percent

(Now I have revised considerably the paragraph No. 3 in the provisions of the withdrawals from the river.)

3. All waters released or spilled on any tributary of the Red River below Denison Dam from the most downstream dam now constructed or to be constructed by the Federal Government on that tributary, and all water released or spilled from Denison Dam shall not be diverted before said water passes the Arkansas-Louisiana State Line, except that: (a) any water released or discharged from storage in a reservoir which has been paid for or purchased by a state or local interest shall remain the property of said state or local interest and said entity shall have the use of this water; and (b) each of the states of Arkansas, Oklahoma, and Texas shall have the right of diversion for beneficial use of flows of the Red River in the amounts of 150,000 acre-feet per year by Arkansas, 150,000 acre-feet per year by Oklahoma and 150,000 acre-feet per year by Texas, subject to (1) maintaining the minimum flows described in paragraph 2 herein above; (2) the provision

that water removed from the main stem of the Red River below Denison Dam or its tributaries below a federally constructed dam on that tributary shall not be exported from the Red River Basin; and (3) the provision that the rate of removal of water by the State of Oklahoma or the State of Texas from the Red River, or that part of its tributary below a federally constructed dam on that tributary, between Denison Dam and the Arkansas-Oklahoma-Texas State Line shall not exceed the amount equal to one-third the rate of flow at the Arkansas-Oklahoma-Texas State Line in excess of 400 cfs. The rate of removal of water by the State of Arkansas, or the State of Texas from the Red River, or that part of its tributary below a federally constructed dam on that tributary, between the Arkansas-Oklahoma-Texas State Line and the Arkansas-Louisiana State Line shall not exceed the amount equal to one-third the rate of flow at the Arkansas-Louisiana State Line in excess of 650 cfs.

4. No water shall be diverted from the Red River Basin without the unanimous consent of the commissioners of the signatory states. Water diverted from the Red River Basin by any state shall be charged to the quantity of water allocated to that state under this compact and such diversion shall in no way affect the quantity of water allocated to the other states.

5. Any quantity of water released or discharged from a federally constructed dam which has been assigned by the United States Government for some specific downstream purpose shall not be included in the quantity of water which can be removed from Red River as specified in paragraph 3.

6. Water for irrigation purposes shall be charged to the quantity of water allocated to that state in paragraph No. 3.

7. The Red River Compact Commission shall have the authority to protect the passage of water within the channel of Red River or any of its tributaries.

As a discussion Mr. Cresap reads the following:

Discussion by Louisiana on Their Proposal for
REACH NO. 5
Red River Between Denison Dam and the
Arkansas-Louisiana State Line

Paragraph No. 1

It is proposed that the States of Arkansas, Oklahoma and Texas should have free use of the water in any tributary above a federally constructed dam. Under the authorized plan for Red River Basin below Denison Dam, these dams are the major projects which could feasibly be constructed for the development of the basin. This proposal does not apply to any state or local interest dams which might be constructed below these major projects. The water released from these major federally constructed dams shall be subject to the provisions of this compact. It is understood that some proposal will be included in the compact to protect the authorized operation of these federal projects. It is understood that some proposal will be included in the compact to protect the authorized operation of these federal projects.

Paragraph No. 2

This simplifies the maintenance of a minimum flow. It is proposed by Louisiana that the 200 cfs will be released at all times during periods when the minimum flow at the Arkansas-Louisiana State Line is less than 1,000 cfs. Since there is considerable variation in travel time for flows down Red River, it would be impractical to try to maintain a graduated scale of releases to meet the low flow conditions. The requirement of a 200 cfs release from the reservoirs in the Red River Basin below Denison Dam is relatively minor when considered on the basis of the required storage capacity to furnish this release as shown by the records of minimum flow in Red River during 1937. During the worst period of record, the required storage to meet this specified condition would have been less than 9,000 acre-feet. This is small compared to the total storage in the reservoirs constructed or to be constructed in the Red River Basin and which exceeds twenty-six million acre-feet.

Paragraph No. 3

This provides for the division of the waters in Red River in excess of the minimum flows at the Arkansas-Oklahoma-Texas State Line and the Arkansas-Louisiana State Line. The States of Oklahoma, Texas and Arkansas are each allotted 150,000 acre-feet per year with certain

restrictions placed on the removal of this water to assure the downstream states of their equitable portion.

(As it stood, the 150,000 acre-feet without any restrictions as to how much you could take out, they could so regulate it to where they would be taking out more than the minimum flow in Red River and without some restrictions to divide the water in excess of the minimum flows and you really don't have anything by saying that you are permitting them to take out a 150,000 acre-feet a year.)

Paragraph No. 4

In the event that it is agreed that some water can be diverted from the Red River Basin, this quantity shall be charged to the water which has been allocated to that state under this compact and the diversion shall in no way affect the quantity of water which belongs to the other states.

(If it is agreed that water can be diverted, as far as Louisiana is concerned, it will be divided on the basis of the water that would be allocated to them, whatever the reach, then the diversion would be charged to that amount that is agreed to by the compact.)

Paragraph No. 5

Any water released from government reservoirs for some specific downstream purpose, such as quality control, navigation, fish and wildlife projects, etc. will not be included in the quantity of water which can be removed from Red River in accordance with paragraph 3 above.

(This means, the way I see it, if the water for navigation is coming down Red River, if the 3 states above decide they want to take some of the water out, their share of the water they take out at that time is a part of the flow in excess of the minimum flow in excess of the navigation flow.)

Paragraph No. 6

Water for irrigation projects in any state will be furnished by that state from the water allocated to it under paragraph No. 3.

Paragraph No. 7

It will be necessary that the Red River Compact Commission have this authority if this compact is to be workable.

GENERAL DAVIS: What do you mean by "protect the passage of the water"?

MR. CRESAP: That the Compact should have the right - that if some state, or some private industry, or private person were to take more than the excess of the water that was allocated to that state, the Compact would have the right to cease - to desist the flow of water and has the right to see that the water in the river which has been released for navigation purposes, the withdrawal is in excess of and depletes the water in its navigation purposes, if the Compact would have the right to say that they desist and take action against them. I would say they would have police problems.

GENERAL DAVIS: That's what I was going to say. It adds an aspect of work of the Compact Commission which I am sure should really be spelled out.

MR. CRESAP: That subject has come up in the past. You take back in the meetings over the last seven years, that has come up and has been discussed, and at that time was favorably looked on and agreed to that that would be a necessary part of the Compact because without it you have no means of assuring any flow of water or assuring that each state was doing what they proposed to do.

GENERAL DAVIS: Do Oklahoma or Arkansas have something comparable here on Reach 5?

MR. JAMES: On Reach 5, under a, subparagraph (1), we would like to concur in the Texas suggestion.

GENERAL DAVIS: As submitted today?

MR. JAMES: Yes. Revised by Texas and submitted today. The only basic difference is that if in the future some small town wanted to build a dam for water supply on some other tributary, it would be foreclosed because it would be a Federal project, and I would like to see that wording the way Texas made its proposal. In paragraph 2, I think we are all three pretty much in agreement. I don't see any reason to change that. Now paragraph 3, in line 3, the change that Texas made "that may be constructed in the future", I'd like to see it. Now then, there's a basic difference further in the paragraph that the statement as made in the minutes and as made by Louisiana said, "that any water paid for or purchased by a state or local interest became the property of that state and all the rest of the water flowed downstream". Now I take exception to that like we have always, for what has been termed as "free water", for the lack of a better term I would like to turn it around and say that the upstream states shall pass out - shall retain 50 percent of this so-called free water - and pass it to downstream state this way. The only water that could

be retained would be that portion which is paid for by local interests, and all other passed out of the state, and be subject to appropriation and use and everything else.

MR. CRESAP: May I comment on it? That is exactly what I think it says. It says -

GENERAL DAVIS: You are now in subparagraph 3(a)?

MR. CRESAP: This water as you go further down - this part you are referring to that has not been purchased by a state or local interest - that water goes into the stream and it can be used by the state but on the basis of 1/3 to Oklahoma above the minimum flow at the state line. I'd better get it a little simpler. At the state line, Arkansas, Oklahoma, and Texas, minimum flow is 400 cfs. If it were 1,000 cfs, then the State of Oklahoma could withdraw at the rate of 200 cfs. This is of the excess water we are speaking of.

MR. JAMES: Another exception we take is this 150,000 for each state. Now, if the depletion at the time of low flow was on the basis of each state to replenish a third each, then certainly we would agree to that. But, we would be a little silly to agree to replenish 47 percent, for somebody who is taking out down below at the rate of 1/3. So, we would want this on the same percentage as the amount of water that has to be replenished to replace that.

MR. CRESAP: Actually, I have no objection to changing this amount at all. I think that on the basis that Forrest has spoken of in the past, and you refer to - there is plenty of water. It is just how you take it out - when you take it out. So, as far as the 150,000 acre-feet, I have no objections if we have to change it to some other amount - this is just something I put in because Texas had put it in, and I didn't think it was my place to change the amount someone else put in.

MR. JAMES: How can we word it so that when water is available for diversion in the main stem that that water can be diverted, but when the diversion is such that the flow at the Louisiana State Line becomes less than 1,000 cfs, then the state that is making that or causing that diversion is required to desist or replace it before the neighboring states must come in and supply that deficiency. You see what I am getting at? If we allow a large diversion downstream, one state makes a big diversion - creates a Louisiana State Line deficiency and the Commission is properly called upon to replace that diversion. Then the diversion according to paragraph 2 - I mean the deficiency - has to be supplied in this percent up here, when maybe the state that is called upon to supply that deficiency (take, for example, that Arkansas would be called upon for 19 percent) - maybe making no diversion. Now some wording has to be provided here that this diversion must be taken care of by the state, making such diversion before the state making no diversion is called upon to supply the deficiency.

MR. CRESAP: That was the reason I have changed this. I thought that - I am referring to the part on page 3 where it gets down to about the sixth line - "subject to" - below that.

GENERAL DAVIS: Page 2? On line six, you say?

MR. CRESAP: It is 1, 2, 3, 4, 5, 6, 7, 8, 9 - No. 3. You see if the base - everything on the Arkansas-Louisiana State Line - that throws the burden on the last state, almost. Oklahoma does not touch Red River after it leaves the Texas-Oklahoma-Arkansas State Line on the main stem, and you would have to have a point of adjustment at that point. Now that is something that Mr. White talked to me about quite often before he left, and I think I introduced that on one proposal, but it was not acted on. I still believe that it has to be a point of control at that particular point, as well as at the next point, because if you don't, you are eliminating one of the states entirely, and then you are getting into something that introduces the discrepancy that you are speaking of there.

MR. JAMES: We would also have to have some language in there about that portion of water that comes out of Oklahoma into Arkansas. Texas has a direct interest, because that touches Texas. In other words - after it leaves the Oklahoma State Line... and that state has no further control, then it becomes Arkansas' responsibility to see that your portion of that water is passed along. There's got to be some verbage in there to handle that and just exactly how you could word that, I don't know.

MR. CRESAP: Well, that's the reason that I have stayed with this business of Federal dams rather than private dams, because the water that we are speaking of is from Federal dams. There's going to be Federal dams controlling all the waters. Although I can understand John's point in wanting the right to any downstream dam, but I can also see how that could engender a very difficult definition as to "what dam", because in reality someone could go in and put in a little weir section down in the bottom of a tributary and say, "This is a dam." And who is to argue legally, "This is a dam." So, you are really getting into something that requires a definition awfully difficult for someone to come up with. In the basin, all the water that we are talking about all the water that is coming downstream for use is out of Federal reservoirs. If you contain it and restrict it to Federal reservoirs in our Compact- to me I think it would be that much simpler and much more feasible to work out something that you could put your ideas into, Texas could put their ideas into, and we could put our ideas into, and Arkansas could. I think that if Texas and Oklahoma and Arkansas wanted something in there on private dams, that could be written into it in a different way, but not to just say all dams downstream or the most downstream dam. That it is too all-inclusive. I believe that makes it awfully difficult. Because we have no idea of what they are, we do know what

these channel dams are, and they are practically either built or we know where they are designing. There may be some other eventually.

MR. JAMES: If we agree to some wording that would protect you against what you are afraid of - somebody dumps some sandbags - which conceivably could happen - and you want protection against that. Some other wording than what we have for the reaches if we left open the possibility of municipal supplies. I would have to study this to see if it accomplishes what I have in mind, and that is what somebody has termed "free water". There will be certain releases that are not it, but those releases that are earmarked should be reserved..... I think they should be protected. The rate of flow - the rate of diversion - you would have to look at that a little bit, but if we did do all these things which protect the low flow, then when that is done you wouldn't object to eliminating any mention about restricting the diversion of water out of the Red River Basin, once you're guaranteed your flow.

MR. CRESAP: You've got to read a little further. It goes a little beyond that. It protects the low flow, but it assures us of a portion of the excess flows below these reservoirs. If you use the Federal reservoirs as the points of release and assure their operation, then we really feel like in the future, as the basin develops, we will get a portion - just a part of those releases...what's above the reservoirs that you are talking about. I can see how the Compact can agree to Oklahoma diverting their share of the water some place wherever they wanted to use the thing. This would give an assurance that we would have the things that we have asked. Assurance of a minimum flow and an equitable portion of the free water.

MR. JAMES: When that is brought about, here is what is going to happen. There are times in a stream when you take the highest flood of record - the flood control storage upstream is hardly adequate to take care of the extreme floods. By whatever amount these impoundments upstream are diverted out of the basin, by that amount you have additional flood control protection, and as long as you get a guaranteed minimum flow plus your portion of the free water - now when Oklahoma passes half their free water out of Oklahoma - (I'll get back on Little River again, and Little River carries a lot of water and it goes through Arkansas, and Arkansas releases what Oklahoma has passed for your benefit, plus half the free water which originates in Arkansas, on to you, which must protect by some language here - plus what you get out of Texas in a sizeable release of additional water, unearmarked, unallocated, and free.) Then when that happens, I can think of no detriment that diversion of those upstream impoundments, lifting it over, and taking it out of the watershed - taking it up as far up in the reach as you possibly can - taking it up way back there as far as they can go and diverting it out of the watershed. Texas could come clear down to the Louisiana line to pick up their water.

MR. FRANCIS: I want to be sure I understood what you said. You said that when the release of 50 percent of that flood water goes through the state line of Arkansas and comes on, plus the amount of water that falls into Arkansas, that is on Arkansas-Louisiana State Line, you made no mention of the amounts of water that we might need.

MR. JAMES: Here's what it would be. If the upstream state releases 50 percent of the water, then they have no further control. Presumably the downstream states would be entitled to some division of that free water coming into the state, plus the free water that's released to Arkansas, in addition. And you would probably want to word this that 50 percent of this free water that comes out of here would be allocated to Arkansas and 50 percent passed on to Louisiana. You would release only your share.

MR. CRESAP: In the Little River Basin, it is between two states: one goes into one state and then it comes down into the other state. I think probably you have a very good thought there, but when you are speaking of the main stem of Red River, you are speaking of four states.

MR. JAMES: That's right, I agree with you - that you have to have a control point up there.

MR. CRESAP: I don't think you can say 50 percent, then, on that portion of it because you are talking of not just two states - you're talking about four states.

MR. JAMES: You will get some out of it - out of Oklahoma - and some out of Texas, and your accumulated amount of water will be fairly sizeable.

MR. CRESAP: That is why I am saying 1/3 because 1/3 is left over for Texas; we get 1/6, you might say. You've got to have something less than a half on that part of it, so I just put in 1/3, 1/3, 1/3, which makes it sound equitable whether -

MR. JAMES: The thing I am trying to hammer out here is - we are stuck on one of two things. What wording can be made on this "free water" to get any mention of any prohibition against the transportation of water out of the basin, because both Texas and Oklahoma are pretty much dependent on that. Now bear in mind that we recognize our responsibility for the downstream states and intend to discharge it. When that is done, then we don't want the Commission having to come back and say - you can't take this out here - for when then on we're through and what is done is considered as the right of that state.

MR. CRESAP: Again speaking for my own, I know what I was thinking when I wrote this. Again, I say that this covers what you are saying there. If you will read No. 4, it says, "no water shall be

diverted from the Red River Basin without the unanimous consent of the Commissioners of the signatory states. But, water diverted from the Red River Basin by any state shall be charged to the quantity of water allocated to that state under this Compact". All this is saying is that the four Commissioners would have to agree - whether they agree before you write the Compact or afterwards - that is something for the Commissioners to decide. What you are saying is the diversion is allocated to that portion of water that goes through to the dam.

MR. JAMES: No state can spend money for the diversion of water if there is a veto power where any time somebody downstream felt they weren't getting all the water they wanted - then no matter how much money the upstream states might have spent to develop that-Veto!- Bingo!

MR. VANDERTULIP: In that case, you wouldn't need this language in the Compact, but you would need the rest of it.

_____: Must be worked out to take out the prohibition of diversion.

MR. JAMES: You take out that first line. Paragraph 4 is just exactly the way that should be worded if you will strike the first sentence out in its entirety. Would you agree to that?

MR. CRESAP: We will if you agree to the rest of it. Will you agree to the rest of it?

MR. JAMES: Oh, no. You've got prohibitions on the diversions all the way up there.

MR. CRESAP: Why don't you take this? I can see how you can't just sit here and look at this. Look through this thing and see what I have said in my proposal, and what John has said in his. Come up with your own proposal, deleting those parts that you object to and the reasons why. Then there is a possibility that you may be coming up with something that we haven't any objections to.

MR. JAMES: All right, I'll tell you what let's do. You don't buy the wording of "any dam that may be constructed in the future".

MR. CRESAP: That's right.

MR. JAMES: I can sympathize with that because someone can go up there and throw in a couple of sandbags and make a little impoundment.

MR. CRESAP: But it's a dam.

MR. JAMES: Then it's a dam. True -- if you would like to change that wording to where municipal and industrial uses would be protected - you see certain tributaries won't have any Federal dam on them at all, these smaller tributaries, -- there is no reason why a small town shouldn't put in a dam there and utilize that water -- now can you protect yourself on that without restricting entirely to Federal dams. 49

Then we will buy 1 and 2 in entirety, and then go down here in 3 and we will rewrite 3, which providing that the last two subitems I am looking at now in the minutes under Reach 5, a(3), the last two parentheses, paragraphs (2) and (3) at the bottom of page 4, take them both out and we will rewrite that 3.

MR. CRESAP: What I said in mine is not what that says in there. That says there "the provision that water removed from the main stem of Red River below Denison Dam or its tributaries below these Federally constructed dams". I am not speaking of the water above a dam -- I am speaking of the water below the dam and on the main streams -- "shall not be exported from the Red River Basin", and we would have to stick with that. Now the water above the dam -- that is the only one that is covered in this No. 4 down here.

MR. VANDERTULIP: It is quite possible that in order for example in deviating water for the city of Dallas from Lake Texoma it would be necessary to get it immediately below the dam. This would prohibit it.

MR. OAKES: The thought occurs to me that that would be water released for a specific purpose.

MR. VANDERTULIP: It's possible.

MR. CRESAP: That's what the attorneys came up with in negotiations.

MR. NELSON: As I interpret this language, if it is allocated to a state and in storage, he can divert this water -- he can divert it anywhere he wants to.

MR. CRESAP: Allocated to a local interest or a state.

MR. NELSON: From below the dam, and it still would have been allocated water.

MR. VANDERTULIP: Let me ask a question of Dan on this item in paragraph 1 in parentheses. We have made reference to it in discussions. That "Restrictions or agreements to protect the authorized operation of Federal projects shall be set forth elsewhere in the Compact." Is it your intention that present operation frozen to prevent historical operation, so that this could not be changed in the future.

MR. CRESAP: That is the way it is written at the present time.

MR. VANDERTULIP: I'm opposed to this thing because we have had too many projects that we've had to go by stage development. We have

one coming up in the Cypress where you have an authorized use for conservation purposes and contract will be needed for Lake O'the Pines, and for some time water may be needed for navigation. This type of language would preclude us even thinking about it. I think the Department of Justice would have some problem. And from a practical standpoint I think each state would have problems.

MR. CRESAP: Somebody must change the way it says it to incorporate what you are saying. But what I am maintaining is that the Federally-constructed dams - if they are constructed for and their purpose has not been changed to release water for navigation, then the language of this Compact should protect them from some state going up above them and diverting all the water to put this Federally-operated dam out of operation.

MR. VANDERTULIP: I imagine the attorneys for the Corps of Engineers, Bureau of Reclamation, and the Department of Justice would take care of most of that.

MR. CRESAP: Well, I'm not too sure they would because sometimes politics will change things, too.

GENERAL DAVIS: Let me make an observation. The question you are talking about is not letting any state change the Federally-stated purposes of a reservoir unless it is duly accomplished. What I am saying is that we have no alternative but to obey - to conform to the Federal purposes for which the reservoir was built. Now, if the Federal Government at some subsequent time reallocates storage that was once in there for one purpose into something else, or does some other change as a part of the Federal law, I am sure, overrides the provisions of this Compact. All this Compact does is - really, this Compact is a permissive thing - an agreement between states, permissible by the Federal Government to allow states to make agreements with themselves which under some circumstances they are not allowed to do. So that I cannot conceive of states trying to or getting away with changing the Federally-authorized purpose of a Federal project.

MR. VANDERTULIP: I think Dan's concern is that you may have Reservoir "X" as a Corps of Engineers' project with the Red River Basin and State "Y"- comes in and says: "We are going to go upstream of this project and put in a dam, above Dam 'X' - the authorized and constructed by the Federal Government, and we are going to catch some of that water and use elsewhere." This then would have effect, waterwise, on this existing project. From Texas' standpoint, if there is a reservoir such as Lake O'the Pines or Pat Mayes Reservoir, that has a water permit on it for use, within certain limitations set forth in the permit, why that permit is first in time within Texas, so any other use in Texas would be subordinate to it. Obviously, if they are getting the

usual 100,000 acre-feet out of this reservoir with the modified permissions of the future, with any new project or projects, they still have to get 100,000 acre-feet out of that. The second and third projects would have to come afterwards. In other words, they would have superior right as totally within the state. Of course, the other states may object to it, but as far as the Texas situation is concerned, those local interests who have to make a repayment on that have got to be protected. If you have a project that is solely for hydroelectric power - We don't have a hydroelectric power for recreation -

MR. CRESAP: You don't have any repayment contracts with local interests.

MR. VANDERTULIP: This might be a problem insofar as quality control. I still have some problems about language here. I would say this, however, that whenever a Compact is approved by the States and the Congress, that any projects that come after - Federal or non-Federal - are gonna' have to be within the framework of the Compact: the Federal agencies would have to live within that Compact just as the State agencies and local agencies would.

MR. CRESAP: You expressed my thoughts very well. As you say, no state at least has an intention or no right to do such; therefore, there is no reason why it can't be put in then to give this assurance.

MR. MCKINNEY: In Lake Texoma, they are talking about recreation. I'm sorry I don't know more about this than I do. Some people up in Oklahoma are anti-Texas as far as recreation is concerned. There is the case where they don't have recreation as an authorized purpose. Many of these older projects usually don't have recreation as an authorized purpose. Now if the Corps comes in with a report to Congress to change the authorized purposes or make some adjustments, whatever it might be, it seems to me that we should not preclude this by a Compact.

MR. VANDERTULIP: If you had something like this as to language; a provision in the Compact that nothing contained herein shall be inferred to change the authorized purposes of any of the existing Federally-constructed projects. Is this the type thing you are talking about?

MR. CRESAP: Yes. We are saying that no provision should limit them from going through the usual procedures in order to change. Nothing wrong with that because you're setting the stage and you are not attempting by the Compact a change in the authorizations works. These would still have to be handled separately in the usual sequence of events.

MR. MCKINNEY: Handled by the Congress. If the authorized purposes of the project are amended by the Congress, then that could be done. The Compact isn't to alter the purpose of the project.

MR. CRESAP: This is written words - what they are saying is fact. I agree that what you are saying is true, but what I am contending here is that the Compact does not, or the state does not on its own have the right to change the Federal projects without going through authorized channels.

MR. JAMES: I don't think states will ever change it. Not unless it was the optional-type thing in the original authorization that left it up to the states on the basis of a contract with the Chief of Engineers to do certain things. I want to say this is few and far between as far as authorization - that we have an option like that.

MR. CLARK: I have one or two items here I want to talk about. I recognize Mr. Cresap's fear that someone might go upstream above these dams and do something. Isn't it probable in the Compact that you'll have some general statement that protects the rights of the Federal Government? There is a general statement of that kind in practically all of them.

MR. NELSON: States can't compact the Federal interests.

MR. CLARK: I have in mind some of the provisions in the recently completed compact between Kansas and Oklahoma.

MR. NELSON: Sorry, I didn't bring a copy along, but Mr. Kiechel is the guy that put it in there. We talked on that for several years and found we could not compact the Federal interest. And those items were put in.

MR. CLARK: I do have a copy of that. I'll get it this evening or bring it down in the morning.

MR. NELSON: You have to say in there that we are maintaining the Federal interest.

MR. CRESAP: I put this in parentheses to be taken care of some place else in the Compact.

GENERAL DAVIS: That's all right.

MR. MCKINNEY: Mr. Chairman, could we possibly delay more discussion on No. 5 and let the Commissioners and their engineer advisers think about Reach No. 5, and go back into Reach 2 and read our statement. Time is kinda' fleeting away from us. That will give us time to give our statement and let everybody think about that tonight and save preparation for tomorrow. I'm referring to the statement between Oklahoma and Texas. I don't want to stop this.

GENERAL DAVIS: The only thought I have is that there is some possibility that a couple of draftsmen - I'm talking about draftsmen, if we can get somebody to stay - a couple of draftsmen could take what we have gotten here today on Reach 5. It appears that paragraph 1 of the agreement - possibly we could redraft in such a way so that there is very little area of difference. Subparagraph 2 is virtually accepted by all. On paragraph 3, maybe we could boil it down in such a way so that we could strike or add elements to it, and present to the Commission here tomorrow. Maybe we could hammer this thing out into some language we could buy. This will requfre, I am afraid, some work this evening by someone to do this - several people. If we could reproduce the things and have them ready the first thing in the morning, i.e., have a draft and the first thing in the morning have it typed - then reproduced. We would have a more concrete talking and discussion paper tomorrow than we would otherwise have. So, I would like to throw that on the table here before we leave Reach 5. Would a group of two or three like to get together with the draft that has been submitted here to us this afternoon - mark them up some way - and let us have them the first thing in the morning? So we could have them typed, reproduced, and available for more concrete discussion later on in the day tomorrow.

MR. McKINNEY: I have no objection at all to working tonight. What was that time, Bill - 6:30? 7:00 to eat, and we should be through somewhere around 8:00.

GENERAL DAVIS: I should think so.

MR. VANDERTULIP: That'll be a rest - come back and go to work for a while.

GENERAL DAVIS: Would you like to work here? We can leave the place open - and we can arrange to have a secretary.

MR. VANDERTULIP: Well, I think if we can impose on Bill to sit with us. We can come back to the building tonight. It will only take a short time to type so we won't need a secretary.

GENERAL DAVIS: Have it first thing in the morning. We can have it typed and run off and back - ready for discussion.

MR. JAMES: Meanwhile, let's listen to their statement on 2.

GENERAL DAVIS: So, gentlemen, may I suggest that -

MR. VANDERTULIP: We had a meeting at 4:00 yesterday morning.

GENERAL DAVIS: This is probably as good a place as any to reconvene. Come on back here, and take the papers that you've got

and cast something a little bit along the lines that everyone can accept; possibly on the draft have alternatives or something like that indicated if there are no agreements.

MR. MCKINNEY: (Reads statement as follows:)

REACH 2
Interstate Tributaries, Oklahoma and Texas

This reach includes the tributaries in the Texas Panhandle, and extends into Oklahoma to their respective confluences with Red River. The Texas proposal has contemplated reservoir development with some limitations of reservoir capacity, on the Salt Fork, North Fork, Sweetwater Creek, and Washita River, Oklahoma has recently included Elm Fork as a tributary with storage limitations in Texas.

Due to the low rainfall pattern of the more westerly portions of the watershed and certain developments in Oklahoma, this is one of the two most sensitive reaches of Red River. Proposed developments in Texas on Salt Fork, Elm Fork, North Fork and Sweetwater Creek have been of major concern to Oklahoma. In recent discussions, Oklahoma has indicated that no limitation of storage will be necessary on the Salt Fork in Texas; but virtually no progress has been made in negotiating for what we believe to be an amount of water proportionate to the Texas contributions in the other streams named. Agreement has been reached that Texas can make developments from the Washita River, but only very small reservoir sites exist in that watershed. It is considered at this time that major differences still exist in Reach 2 on Sweetwater Creek and North Fork Red River.

The proposed Texas apportionment for this reach states:

1. 'Texas shall have free and unrestricted use of the waters of Buck Creek, Lebo: Creek, Prairie Dog Town Fork, and Elm Creek within the boundaries of Texas.

2. Texas shall have free and unrestricted use of the waters of Washita River, Sweetwater Creek, North Fork Red River, and Salt Fork Red River within the boundaries of Texas, provided that Texas shall be limited to conservation storage capacities in reservoirs which may be constructed on each of these tributaries to the following amounts:

Washita River	18,000 acre-feet
Sweetwater Creek	35,000 acre-feet
North Fork Red River	55,000 acre-feet
Salt Fork Red River	160,000 acre-feet

3. Texas may construct additional reservoir capacity to replace reservoir capacity made unusable by any cause.

4. Oklahoma shall have free and unrestricted use in Oklahoma of the waters of interstate tributaries which originate in Texas, subject to the allocations of water contained in subsections 1, 2, and 3 hereinabove.'

Oklahoma's December 1964 counter-proposal includes a limitation of storage on Elm Fork and the following conservation storage capacities:

	TEXAS	OKLAHOMA
Salt Fork	160,000 AF	No limit
North Fork	55,000 AF	15,000 AF
Sweetwater Creek	35,000 AF	15,000 AF
Washita River	18,000 AF	18,000 AF
Elm Fork	46,000 AF	4,000

Texas understands proposed provision No. 1 to allow any development and use of the named tributaries in Texas and in conjunction with proposed provision No. 2, to allow any development and use of any tributary in Texas not specifically named in either section No. 1 or Section No. 2.

The basic problem area concerns the Sweetwater Creek and North Fork Red River reservoir capacities. Each of these tributaries provides some of the water supply of the Altus-Lugert Reservoir project in Oklahoma.

The conservation capacities proposed by Texas are about the optimum size reservoirs for the potential sites. Sediment storage and flood control allowances would be in addition to the conservation storage. The Altus-Lugert project provides muninipal water to Altus, Oklahoma, but most of the project water is used for irrigation. Historically, the project has experienced both shortages and spills. The total drainage area above the Altus Dam is 2117 square miles of which 1350 square miles or 63.7 percent is located in Texas.

The Altus Reservoir has a sediment problem and without upstream reservoir development will experience a marked loss of storage. With one or both reservoirs on North Fork and Sweetwater Creeks the useful life of Altus Reservoir would be extended.

Studies by the U. S. Bureau of Reclamation indicate that the Altus Reservoir capacity at the top of conservation storage had decreased from its original capacity of 156,668 acre-feet to a capacity of 132,835 acre-feet by 1962. The USBR estimated the remaining reservoir capacity in year 2012 without upstream development to be 92,402 acre-feet, or a loss from 1962 to 2012 of 40,433 acre-feet. Studies by the Texas Water Commission indicate that with Sweetwater and North Fork Reservoirs in operation that the Altus Reservoir would

have a remaining capacity of 118,390 acre-feet in 2012. The two upstream reservoirs would thus reduce silting of Altus Reservoir by 25,988 acre-feet and have that storage available for use in Oklahoma.

Losses of water originating in Texas take place in the river channel in Oklahoma upstream from the Altus Reservoir. Channel loss equations developed by the U. S. Bureau of Reclamation for Salt Fork were adjusted to the North Fork and corrections made for channel losses in the Water Commission hydrology studies.

With reference to storage reservoirs in Texas on Sweetwater Creek and the North Fork of Red River our studies show that sediment production on Sweetwater Creek over a 50-year period would be 15,200 acre-feet, and on North Fork sediment production would be approximately 40,000 acre-feet.

The Oklahoma proposed conservation storage for Sweetwater Creek of 15,000 acre-feet (in addition to necessary sediment storage) would have a yield of 3,700 acre-feet per year. The Texas proposed conservation storage of 35,000 acre-feet (in addition to necessary sediment storage) would have a yield of 6,000 acre-feet per year. If the total storage (conservation plus sediment) were only 15,000 acre-feet the initial yield of 3,700 acre-feet per year would be reduced for all practical purposes to zero within 25 to 30 years. The increase in yield of the two proposed sizes is 2,300 acre-feet per year.

Water Commission studies of Sweetwater Creek Reservoir show that during the 22-year period 1938 through 1959 a reservoir with a 35,000 acre-feet conservation capacity would not have spilled during 14 of the years. With a reservoir having a conservation capacity of 15,000 acre-feet spills would not have occurred in 13 years. The only difference between the two proposed sizes would be a small spill in one year out of 2.

The Oklahoma proposed conservation storage for North Fork of 15,000 acre-feet (in addition to necessary sediment storage) would have a yield of 6,500 acre-feet per year. The Texas proposed conservation storage of 55,000 acre-feet (in addition to necessary sediment storage) would have a yield of 21,200 acre-feet per year. If the total storage (conservation plus sediment) were only 15,000 acre-feet the initial yield of 6,500 acre-feet would be reduced for all practical purposes to zero within 16 to 18 years. The increase in yield between the two proposed sizes is 14,700 acre-feet.

Water Commission studies of North Fork Reservoir show that during the 22-year period 1938 through 1959 a reservoir with a conservation storage of 55,000 acre-feet would not have spilled during ten of the years. With a reservoir having a capacity of 15,000 acre-feet spills would not have occurred during six of the years.

The Altus Reservoir project under 2012 conditions without upstream reservoirs would experience an average annual shortage of 43,800 acre-feet with an average annual demand of 108,900 acre-feet during the period 1938 through 1959. Shortages would occur in 14 of the 22 years. Under 2012 conditions with Sweetwater and North Fork Reservoirs in operation the Altus project would experience an average annual shortage of 57,700 acre-feet with an average annual demand of 108,900 acre-feet during the same study period. Shortages would occur in 17 of the 22 years. The difference in average annual shorgages due to upstream development is 13,900 acre-feet.

Runoff from Texas constitutes over 60 percent of the Altus project water supply. The difference in shortages under the two conditions of 13,900 acre-feet is only 12.7 percent of the annual demand of 108,900 acre-feet.

Conclusions reached from the foregoing studies would be:

1. That the economic considerations of building two reservoirs having original capacities of 15,000 acre-feet each would be unwarranted.

2. Reservoirs on Sweetwater Creek and North Fork having conservation capacities of 35,000 and 55,000 acre-feet, respectively, would be near the optimal developments."

Mr. Chairman, we feel that that pretty well explains the situation and gives a comparison of the proposals and shows that actually we don't feel that with upstream reservoirs we are hurting Altus appreciably. In fact, we further feel that if these reservoirs are constructed in Texas, that the actual operation would show that Altus wouldn't be hurt at all.

MR. VANDERTULIP: On page 2, that small table there might properly be entitled "Texas Proposal" and "Oklahoma Proposal" for the amounts of storage, and the last item on Elm Fork, 46,000 has not, I don't believe, appeared previously in discussions. At Oklahoma City, we met with Mr. James and talked a little about this whole area during those discussions. We have come up with a 46,000 acre-foot figure on Elm Fork and I don't believe this has been mentioned in your previous minutes.

MR. JAMES: How this all came about was - we have been asking for restriction on Salt Fork and there had been quite a little discussion about Salt Fork development in Texas and as a compromise, in order to - in the hopes of getting agreement - we backed off asking restriction on Salt Fork, and said we would endeavor to develop Elm Fork if the pollution could be reduced satisfactorily, and make no demand on Salt Fork. Naturally, Elm Fork came in. We proposed that as "grasping at straws" - hoping that there might be some bases which we could apply

foregoing any demand on Salt Fork, if and when the chloride pollution is reduced to a usable level.

GENERAL DAVIS: I won't say that I understood everything that you read here, but I gather that for one thing, by building these reservoirs upstream, it would help the siltation problem and it would extend the life of Altus.

MR. VANDERTULIP: The Bureau of Reclamation studies indicate that with no upstream impoundments Altus would have a gradual decreasing capacity, and conversely a gradually increasing average annual shortage due to sediment depletion. There are also channel losses which take place on water that passes the Texas-Oklahoma line. Some of these various changes have been integrated into the study and the net effect is that the development of the two reservoirs in Texas would only increase the average annual shortages of Altus by 13,900 acre-feet. These shortages - historically - the historic operation has been used to try to duplicate them in these studies. We found that under 2012 conditions this would result in an average annual shortage of 43,800 acre-feet. Now this is what we're facing. We realize that they have not had an adequate supply of low water. They have experienced spills at some time and shortages at others. The shortages in the future with upstream development of the size reservoirs Texas proposes was being increased by 13,900 acre-feet - greater than would be experienced without Texas operating the reservoirs, and also since more than 60 percent of the water supply in Altus comes out of Texas, we feel that we are not asking for much.

GENERAL DAVIS: This is also clear to all of you. I am sure it is not difficult to understand that anyone who has never seen the area doen't know what these things are by direct observation. But, what Texas is proposing here is a dam and reservoir, in Texas, on each of these four or five streams. Is that correct?

MR. VANDERTULIP: Except for the Washita (points on map).

GENERAL DAVIS: There's a pointer there beside you, Mr. Vandertulip.

MR. VANDERTULIP: There is a highway that runs to the north and south approximately on the western edge of the symbol Texas on this basin map. There is a reservoir site just east of the highway on North Fork and Sweetwater Creek. These are the reservoir sites that we used. Above that you are in oilfield development. On the North Fork you would have to buy a railroad. These are the only places that we could find reservoir sites that might be utilized for development. On the Washita River, there's a small amount of 18,000 acre-feet that would really not have any effect downstream. The Elm Fork has a drainage area somewhat larger than drainage area above Sweetwater Creek Reservoir. So we have scaled up the capacity that we asked for on Elm Creek to be between the Big North Fork and

Sweetwater Creek drainage areas that were developed in the detailed studies on North Fork and Sweetwater Creek Reservoirs.

MR. VANDERTULIP: Ivan reminds me that the damsite on the Elm Fork is very close to the state line.

GENERAL DAVIS: Well, there would be one on the Washita. And then one on Sweetwater, North Fork, and one on Elm Fork?

MR. VANDERTULIP: I'll say, yes, to the one - but there may be more than one. On North Fork and Sweetwater Creek, I would say, yes. This would probably be the case because of lack of good sites. Although there might be some small reservoirs that could come into the picture of a few thousand acre-feet would have to be subtracted from the total numbers. As an example of this, where we definitely know two reservoirs to be involved would be the Salt Fork - there would be about 60,000 acre-feet in the Greensbelt project and something like a 100,000 acre-feet in another project, which would approach the 160,000. In other words, this is a limitation of total conservation storage and it need not necessarily be in one site. For practical purposes, it would be on Sweetwater Creek and probably would be on North Fork, although there's the McClellan Reservoir, which is not shown on this map. It is a small recreation reservoir. It might be rebuilt and small enlargement made on it. It was built back in the triple-C days.

MCKINNEY: I might explain further that on the Washita we have some figures given for negotiation purposes just to help us. We have no proposed sites on the Washita in Texas.

GENERAL DAVIS: Now in looking at your proposals here for Texas and Oklahoma, apparently there is no conflict with regard to Salt Fork and the Washita. Is that correct? (Answered- yes) But there is a conflict on these others - and your points that you have made in your presentation would pertain not only to the fact that it would allay sedimentation of reservoirs downstream from those that would be put in Texas, plus the fact that actually the way the water comes you are really not hurting it as badly as we think.

MR. VANDERTULIP: Yes, and also the economic factor has to be considered in any proposed reservoir as well as the water supply downstream. With the Sweetwater Creek Reservoir, the total difference between the two size projects, 15,000 and 35,000 acre-feet. Out of 22 years you have one more year of spill. This was a small spill, so you have essentially the same water supply at Altus, regardless of the capacity put in Texas on the Sweetwater Creek of the two sizes we are talking about. The 15,000 acre-foot reservoir - and it raises the water considerably at the site - you still have to pump it to the point of use. You have very small yield with the smaller size reservoir, and as the result of this, your cost per thousand gallons

goes up considerably. In addition to that on the Sweetwater Creek site, you've got the site - the physical site is such that you have to have a reservoir bigger than 15,000 acre-feet, plus the sediment storage to get economical construction with the spillway location. So, all those matters considered, we feel that 35,000 acre-feet is the minimum size that would have the least effect downstream or essentially the same effect as the smaller size reservoirs.

MR. NELSON: You put how much - 35,000 in Sweetwater and how much in North Fork, 55,000.

MR. VANDERTULIP: That's in addition to the sediment capacity.

MR. NELSON: That's just about the average flow of those two streams at the state line.

MR. VANDERTULIP: That might be. Of course, 0 and 100,000 average 50,000. When you get 100,000 acre-feet in one year, you are obviously going to spill some. And when you get 0 flow you won't - nobody will. We have yet to put in reservoirs west of the 98th.

MR. MCKINNEY: Mr. Chairman, I might make another comment on this here. Mr. Stout, last December, made a study on Elm Fork. At that time, Texas was proposing their conservation storage on Elm Fork as 100,000 acre-feet. As you can see, we have since reduced that to 46,000 acre-feet. Under Mr. Stout's proposal, it is suggested-or proposed- a site called the Navajo site in Oklahoma, which, if constructed, would give a net yield of 113,500 acre-feet of new water per year, which is the approximate total of present yield of Lake Altus. Of course, that proposal was naturally based on cleaning up these salt springs on Elm Fork, which the Corps has a proposal for or a suggested remedy. There is a possibility, of course, that that water can be taken from the Navajo site and on this irrigation project. And with that flow and with that proposal, Oklahoma would have 113,500 acre-feet of new water, which is the total firm yield of Lake Altus. We proposed that to Oklahoma when we met with them in December. We further have some other action considerations, which we will discuss tomorrow under an action program which might be adopted as a state help, and of course, indirectly add in our Compact negotiations.

MR. NELSON: When did the Bureau of Reclamation give you those figures, John?

MR. VANDERTULIP: You will recall that wintery, icy day that we met - we got them - either at that time or they mailed them to us afterwards - the sediment studies and the channel loss equations on Salt Fork. And we got the historic data on the operation of Altus.

MR. NELSON: Channel losses on Salt Fork are not comparable with the North Fork.

MR. VANDERTULIP: Yes, sir. We went over our studies with the Bureau of Reclamation. I rather recall it was something less in North Fork than on Salt Fork. The slope of the lines is the same. Channel losses are the same. The intercepts were different.

GENERAL DAVIS: We are scheduled to have the first thing tomorrow morning a briefing by Colonel Morris on the investigation study.

MR. MCKINNEY: I understood that we were.

MR. VANDERTULIP: That's not on channel losses just on salt study. The Bureau of Reclamation in conjunction with their management studies have made the sediment studies on Altus. They had these run and gave us a set of their studies on Altus. Let me point out just for further clarification. These sediment numbers on Altus, the capacities shown are the capacities at the top of the conservation pool level. Some of the sediment during flood periods is deposited up above the conservation pool and, of course, some goes over the spillway and that's why they don't add up.

MR. JAMES: Mr. Chairman, we will, of course, have to make some study of this before we will be prepared to discuss that problem further. The Navajo project - when it was first brought up I was very exuberant, but my exuberance has been chilled every time I bring it up because the Bureau of Reclamation tells me that even these known salt springs were eliminated entirely (100%), there would still be contamination in the water that we capture, and whether or not further action is to be taken, we will bring that up with Colonel Morris in the morning. But as of now, the Bureau of Reclamation is most discouraging, and I would like to have time enough to get into this rather thoroughly. I had hoped that maybe before we could leave here, hammer out the rest of this compact. In fact, we have John Bliss, our consultant, working on it now. I think that is the approach we're going to take.

GENERAL DAVIS: Well, I think that what Texas has submitted here is a very logical approach to what we are talking about - this presentation. I would think that you can certainly use this as a basis for your determination as to whether or not you can leave out this.

MR. JAMES: Yes, you must realize that we have got the irrigation district - the Altus District. We will carry this back and see what we can do with it.

MR. MCKINNEY: Mr. Chairman, may I say here as an additional remark? On our report here on Reach 2, we are reluctant to disclose all the information we have on our studies, due to the fact that

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certain interests in Oklahoma have more or less threatened us with a lawsuit. We have been handicapped in presenting our studies to the State of Oklahoma for that reason. So we feel like we have extended ourselves greatly in disclosing our thinking along this line on those reaches - those tributaries of the Red.

GENERAL DAVIS: Well, I appreciate that. I don't know what the background of this lawsuit is. These are the people, who are indirectly connected with the problems - I feel like they are whirling around in space. But I am sure that what we have got to do, gentlemen, is to lay the cards down on the table over here so that we can have some basis for agreeing or some basis for narrowing the area of disagreement - and that we might find that we'll have to toss a coin and say this is the way it has got to go. It won't be a major element that's got to be determined by somebody - some compromise. Especially in Reach 2 over here where we're dealing with a distribution of shortages.

MR. NELSON: Mr. Chairman, I didn't see the letter but I think somebody wrote about there ought to be some recreational lakes in Texas. I don't think Mr. James in his presentation mentioned it.

MR. VANDERTULIP: This was in connection with the Sweetwater Creek Reservoir. The City of Altus threatened to bring suit on it.

GENERAL DAVIS: Well, I realize that is one of the hazards and handicaps in trying to get on with the work of this Commission. Since we are dealing with particularly - shortages - nobody is going to come out of this agreement; particularly Texas and Oklahoma, with everything that he really wants. It seems to me that somewhere along the line, both parties have got to be in the mood to do a little compromising; giving a little bit, but being realistic, realizing that the other guy is giving up something, too - all for the purpose of arriving at an agreement which will unfreeze a lot of possible restrictions that you have now, because there is no Compact in existence.

MR. VANDERTULIP: Well, General, I feel that the Texas Water Commission is in somewhat of an awkward position in these negotiations because we've had an application for a water permit project on Sweetwater Creek, asking for some 90,000 acre-feet for storage. We are negotiating on a basis of 35,000 acre-feet of storage plus sediment storage, which would be less than the 90,000 acre-feet. I think we certainly are showing good faith in trying to come down with something reasonable. By doing this, we face the fact that local interests are opposed to this 35,000 acre-feet size.

GENERAL DAVIS: Well, I am sure that there are parties on both sides of the line who want more than the figure shown there.

MR. MCKINNEY: We feel that we are certainly attempting to settle the controversy and help the Compact by disclosing the studies that John Vandertulip and his staff have made.

GENERAL DAVIS: Would you like this information here treated as privileged information?

MR. VANDERTULIP: No, these were the results in the form that we feel will be for the record. But we could not furnish detailed sheets.

GENERAL DAVIS: Well, going back to your comment, Mr. James, I appreciate the fact that you can't give a decision. Do you have anything on Reach 2 to present?

MR. JAMES: We are having a study made and has been underway for a couple of months, but it isn't yet completed.

MR. CLARK: I took your statement that Mr. Bliss is working on it.

MR. JAMES: Until that study is complete, we would hardly be able to comment.

MR. VANDERTULIP: You might point out, General, that at the Houston meeting we went over the channel loss studies with Mr. Bliss, our approach to doing this work - this was before we had developed the channel loss equations. Salt Fork studies are the same method as Pecos River studies, which Mr. Bliss is very familiar with. I feel that he has that background and methodology he was using on the channel losses.

GENERAL DAVIS: What sort of time are we talking about, Mr. James?

MR. JAMES: Mr. Chairman, that I do not know. Frank Raeb made the arrangement with him immediately following our last meeting. He has done some work and said that he would get to it as soon as he could.

GENERAL DAVIS: A month, six months, a year?

MR. JAMES: I would say that when we first talked about that he was talking somewhere in terms of six months. Say mid-summer.

MR. MCKINNEY: May I ask a question on Mr. Bliss' studies? Is he studying the Red River Basin only, or is he going outside the basin?

MR. JAMES: He is going to do both. In other words, he will study everything west of the state line in an effort to solve that problem, plus the fact that if there is a possibility of picking up some water in the Canadian - modification of the Canadian Compact - to such an extent we might be able to make some concessions up there.

MR. VANDERTULIP: Mr. McKinney, I'm talking about the conversation in which you suggested the possibility of modifying the Canadian Compact to alleviate certain possible shortages in the Texas Panhandle - This would involve going back to Congress and getting another authorization, plus negotiations, making compact again, making changes - be correlated timewise with the Red River Compact, which involves bringing New Mexico into any compact changes. There is a water quality problem in the Canadian River downstream from Sanford damsite. This is one of the reasons for the selection of that site at that location. So, I would doubt very seriously if Texas could entertain the inclusion of the Canadian-Red Compact. There is a question of whether we'd get New Mexico to accept the compact - since they have just completed a project at state cost - a non-Federal project. I just don't see much possibility of including the Canadian with the Red River Compact.

GENERAL DAVIS: Well, it seems to be indicated now that we have the presentation by Texas of their draft on the subject, that we are in limbo until we hear from Oklahoma. So, Mr. James, the ball is with you.

MR. JAMES: We will expedite it as rapidly as we can and push these things as rapidly as we can. Meanwhile, let's just temporarily table this Reach 2.

MR. CLARK: Do we want to go back to Reach 5?

MR. JAMES: Let's work on this thing tomorrow.

GENERAL DAVIS: If it could be accomplished by staying here, it would be well worthwhile. The only reason for adjourning is to get something done which we can't do here.

MR. JAMES: Reach 2 must be held. But we could complete everything from there on down.

MR. VANDERTULIP: We could stay through Saturday. We do have commitments on Monday.

GENERAL DAVIS: I really think in the final analysis that this is the way the thing will be accomplished - just by sitting down and getting so tired that even people like Watts over here (meaning Mr. Cresap) would be more agreeable. We were scheduled to open at 9:30 tomorrow morning, but we open shop here at 8 o'clock.

(Discussion here)

MR. VANDERTULIP: I understood that Colonel Morris was going to have a briefing on the water quality projects. (Discussion here)

GENERAL DAVIS: All right, then, we will meet tomorrow at 8:30.

END OF AFTERNOON SESSION

On the morning of 2 April, Colonel Morris, assisted by Messrs. DeGeer and DeBruin (all of the U. S. Army Engineer District, Tulsa) described the water quality control study being made by the Corps of Engineers and Department of Health, Education, and Welfare in the Arkansas and Red River Basins. Colonel Morris pointed out the magnitude of the salt pollution of the two rivers from natural sources, stating it amounted to approximately 16,000 tons of salt per day. He described the areas under study and stated there were relatively few natural pollution sources in the Arkansas River Basin that contributed a large amount of the total salt. He also stated that although there were a large number of natural pollution sources in the Red River Basin, most of the pollution originated in very few of these sources. Colonel Morris explained the investigations made, the various methods considered for control, and experimental field efforts to control salt springs. The output of Estelline Springs was stopped by building up a back pressure of about 5 ft. Efforts to dike around hillside springs at a different location were unsuccessful.

Colonel Morris discussed the magnitude of the pollution of brine from oil wells and discussed the possible degree of control that might be realized and the effect on water quality. If all control methods were employed, a large amount of stream flow now unsuitable for use would be useful.

It was pointed out that the report was being made in two parts. Part one is about complete and part two is expected to be completed in January 1966.

Discussion was held on several items. On the question of rate of evaporation, Mr. Vandertulip mentioned experience on the Pecos where the rate decreased as salinity increased.

(BREAK HERE)

GENERAL DAVIS: The first thing I am going to do is ask if there were any comments on the minutes of the last meeting?

MR. JAMES: I think these minutes pretty well fairly describe what we have done at the last meeting. That is what they are for.

(Pause for looking over minutes)

GENERAL DAVIS: Gentlemen, let me direct your attention to the minutes of the 33d meeting - that's the meeting preceding this one. Are there any comments or corrections or anything other than suggesting approval for those?

MR. JAMES: Mr. Chairman, they fairly represent what was done at the last meeting.

_____: I move the approval of the minutes.

_____: I second.

GENERAL DAVIS: Those who favor the adoption of these minutes, please indicate by saying "aye". Gentlemen, I think then our next order of business would be to go back to our consideration of the basin by reaches. I would suggest that we go back to Reach No. 5. Would any of the Committee members like to take the ball from there?

MR. VANDERTULIP: The Louisiana proposal was the one we were working on this morning.

GENERAL DAVIS: All right. Does everyone have a copy of that?

MR. JAMES: Yes.

MR. VANDERTULIP: Actually in the discussion this morning in which all states were represented - after some discussion it was pointed out that in the Louisiana proposal there is an "either/or" type of provision as between items No. 2 and 3, and after some discussion it was felt that there could be some area of agreement by the deletion of - or not using the item 2, and some possible modification of item 3. In other words, using item 3, we would have for all intents and purposes the Index gaging stations at the Arkansas-Oklahoma-Texas State boundary, a depletion allowed - diversion for depletion allowed - whenever the flow is in excess of 400 cfs, with some limitation on the total.

GENERAL DAVIS: When you are referring to item, you mean these paragraph numbers?

MR. VANDERTULIP: Yes.

GENERAL DAVIS: Which page are we on? 1st or 2d page?

MR. VANDERTULIP: The second page. Near the end of that paragraph - the paragraph that takes up most of the page - we find that this * * * .

MR. FRANCIS: John, may I inject this thought here? In order to bring Mr. Clark and General Davis up to where we left off this morning, why don't we start at paragraph 1?

GENERAL DAVIS: All right, we'll start at the beginning and I won't feel like Grissom.

MR. VANDERTULIP: We discussed principles rather than language this morning, General, so we may not be in full agreement on some of these words here. But I was thinking, as I understand it, if we take each one of these paragraphs, why we might have some corrections on it, or thoughts on it, from the whole group. On paragraph 1, because of some of the definitions which had been developed in the past in drafts of the Compact, some additional definitions are being drafted or suggested. This morning, we agreed to take out the words "or subtributary" when it occurs twice.

GENERAL DAVIS: On the second line?

MR. VANDERTULIP: On the second line and the fifth line. Also, in that second line we have the word "in", and within the overall framework allowing for transbasin diversion, with the states making the diversion being charged for it, that can be changed from "in" to "from". The item in parentheses I feel has been fairly accurately covered already in the draft of the Compact prepared by the Legal Committee. Mr. Belanger has presented it on behalf of the Committee some time back. This Article 3, Limitations, that was in the draft of that Compact, I think, provides for the Federal projects - that is, for not changing the Federal projects. Perhaps that might have to be reviewed by the Legal Committee in light of this suggestion. In other words, we are not going to do anything that would change the authorized purposes of the project by the Compact itself. But rather than having it in this particular reach, if there is any language about the Federal projects - it ought to cover the entire basin rather than just a specific reach.

GENERAL DAVIS: So you would suggest the removal of the wording of this parenthetical statement?

MR. VANDERTULIP: Well, its sorta a flag anyway. It would probably be something for the whole basin rather than just a particular reach. One additional item that I had raised this morning is this matter of drafting some language. On this paragraph 1. We do not

want to preclude the possibility of non-Federal development. There will have to be some appropriate language to make possible non-Federal development, probably on tributaries - smaller tributaries. Otherwise, as this reads now, such an impoundment would not be provided for. The basic problem is the creation of a reservoir below a non-Federal reservoir in the main stem.

MR. CRESAP: Yes, in fact the water that we are really speaking of releases from the Federal reservoirs, because they are so constructed, or proposed to be constructed to such a point on the tributaries that they would control the major portion of all the tributaries. What we are contending in this is that no states should have the right to go down at the mouth - say 5 miles below a Federal reservoir and put up some minor dam. They would say we have a dam now so we have the right to all the water above this dam. We are really negotiating the waters that come out of these Federal reservoirs. Something should be written as far as we are concerned that would give the right to put another reservoir on a stream, as long as it protected the states for their share of the waters from the Federal reservoirs. How that will be written, I don't know.

MR. VANDERTULIP: Let me offer a suggestion * * * that non-Federal development projects - non-Federal or Federal - would not be precluded above a Federal reservoir or on tributaries in which Federal reservoirs do not exist. In other words, we go to Podunk Creek and some small town wants to put up a reservoir * * *.

MR. CRESAP: Our intent right now is to take what is there, or to be there, in reference to Federal reservoirs.

MR. VANDERTULIP: We have one instance and I think it will probably occur in other states, too. I can visualize, say in the Red River system where they may want to put in an off-channel reservoir and pumps, to pump into the reservoir with the intent of holding for short periods. Any language we come up with should not preclude that type of thing.

MR. CRESAP: This is what you call depletion diversion. I would think that this would be covered in No. 3. I would like to make the suggestion at this time that since I have written what Louisiana is speaking of and this is a revision to implement or protect the upstream states in their construction - that Texas or Oklahoma, or together, be delegated the task of putting in some verbiage and submitting it to us for our consideration. And I think we need time to think about this because this is a very important part of the Compact.

GENERAL DAVIS: Can Texas and Oklahoma do this?

MR. VANDERTULIP: If we conclude that this is the type of thing we're after, and work on it today with the idea that we could get up a working draft to talk from before we leave. We can get all these ideas and thoughts of everyone.

GENERAL DAVIS: What remains on paragraph 1 then is to develop some language which will provide for other than Federal Government projects.

MR. VANDERTULIP: And will cover areas - the tributaries where presently you do not have developments.

GENERAL DAVIS: All right. Paragraph 2.

MR. VANDERTULIP: Paragraph 2 and paragraph 3 are actually alternate. So we have, for discussion purposes today, taken paragraph 2 out and have been concentrating on paragraph 3, so I think for this purpose we can - for a working draft - omit paragraph 2 at this time.

MR. CRESAP: I think that I would still like to hold this in abeyance because as I explained to them this morning, I would rather let this stand because we have not agreed on 3 or the whole thing, and it may be we have to fall back on 2, so I would say that we would set this aside as dependent on the agreement and that this not be further discussed.

GENERAL DAVIS: Meaning the reservations?

MR. VANDERTULIP: On paragraph 3, there were no changes on the first page. There was some reservoir on that part (a) which starts on the first page. Texas and Oklahoma - existing uses that the diversions from Red River as to how they might be handled. These are generally small uses, but investments have been made and that we have some reservations on the effect of this language on such uses. What I am saying is: We may have to have some modification.

GENERAL DAVIS: Well, the way it reads that "any water released or spilled from storage in a reservoir which has been paid for or purchased by a state or local interest shall remain the property". You are concerned about the protection of the rights of these people who have paid. Doesn't it say that?

MR. McKINNEY: Well, there's some use that may be made of it - especially power releases from Denison Reservoir.

MR. CRESAP: He is saying that at the present time somebody, a private person, has a pump that they are pumping water out of the Red River right now. I would like to ask this: In this provision or inclusion, could you give us some idea of what quantity we are talking about?

MR. VANDERTULIP: I frankly cannot tell you because * * *.

MR. NELSON: From Oklahoma, we are irrigating a little over 2,000 acres. In my humble opinion, * * * .

* * *

MR. JAMES: Mr. Chairman, there is one more thing on the next to the last line on the first page where it says "storage in a reservoir which has been paid for or purchased by state or local interests", I believe that should say "which has been paid for, purchased", and insert immediately afterwards, "or contracted for". Now there are several instances already wherein lakes districts have contracted for a certain amount of water out of Kokomo Reservoir. It's neither purchased at this time nor has it been paid for, but it's contracted for. The contracts are all in effect.

MR. CRESAP: But are they using it?

MR. JAMES: As of now they are not using it because the reservoir is not completed and they can't. They will use it, but maybe not ever the entire amount of acre-feet they've contracted for - but they will use in time a part of it. And by this wording they could be excluded.

MR. CRESAP: No, sir. When they pay for it and start using it, then it is their's. But until the time they pay for it, just because they have someone to draw up a contract, actually the water isn't their's yet.

MR. NELSON: Don't you think if we would say - talking about this free water releases - let's just name them - floodwater, water quality control. Now in the cases of below Denison Dam and the Boggy and the Kiamichi in Oklahoma, let's say that Oklahoma and Texas will retain 50 percent of the releases of floodwater, power, or water quality control, and that Oklahoma can deplete 37 percent and Texas 34 percent. The rest of it goes on down. 50 percent of it is being passed. Then it is up to Arkansas to make trade with Louisiana.

* * *

MR. FRANCIS: Question? You continually refer to 50 percent - Why?

MR. NELSON: The state should be entitled to 50 percent of the water.

MR. CRESAP: Well, actually what I understand you to say that if there is a 1,000 cfs of excess water, 500 of it would be divided between Texas and Oklahoma - figures out as 50 percent they would take out and 50 percent they would pass on down. That portion of it, I can understand. The other part, I would have to give that a lot of thought. Every time I put something down on paper and I think about it, many things come up that you don't think about right here. I think that happened to me with Texas - what he thought about - that gives it a different picture.

MR. NELSON: What other releases might be made for?

MR. OAKES: Right now I can't answer.

MR. NELSON: Well, the things I think of are flood control releases go downstream, water quality control should be stored and then released, and power releases.

MR. OAKES: What about irrigation?

MR. NELSON: Well now, that's interesting - I think a state should consider equitable portion of the water - all their rights have to be in that equitable portion. There's no point served in going into the needs in this 50 percent. In other words, you can't identify the percent. In other words, you could give Oklahoma their equitable water - we have to live with all those percentages.

MR. OAKES: Do you have to specify what those releases would be?

MR. NELSON: Release water percentages released water from power and water control. That is water that is coming on down. If it is water that's released for any other use, * * * .

MR. CRESAP: Let's say that there is a town wanting downstream releases from a reservoir. Let's say that you as a state turn the water loose for that town. The town doesn't pick up all of this amount. They don't want to for some reason or another. This water then adds to you as a state - you would give the right to use it for something else - but if you specify some of these things.* * *

* * *

MR. VANDERTULIP: I think that percentages really may provide some semblance of a problem if you are trying to apply an average percentage. I think we will end up with some percentages but I can see some real problems in doing so.

MR. NELSON: Well, your low flows are going to be taken care of by these power releases and your water quality releases.

* * *

MR. NELSON: * * * Broken Bow. They tell us that the benefits are between Broken Bow Reservoir and the upper part of Millwood Reservoir. When we have unknown waters, they have done their job then.

MR. CRESAP: The overall purpose is to improve all the waters of Red River - not specifically from one point to another point - is the general overall purpose of this plan. * * * and when you start specifying, now we are on quality control * * * so if we put that - and say it comes half way down, serves its purpose, then it crosses the State Line, then it becomes water that everybody could use, but under the thing of naming - its enough to say "not quality control water".

* * *

MR. CRESAP: I disagree. I think these water quality studies go on down for the entire basin. This improves the quality of water in that particular region which makes a greater volume of water available - for the entire reach - but it is not for that specific location but is* * *

* * *

MR. CRESAP: General, may I make a suggestion that since we are talking about this, let's go ahead and talk - then have Oklahoma present their revision of what they think would be better for this, so that we can consider it. Because I have written this out now many times - as discussed this morning - and as there have been objections to this, I would like to have it revised. I would also like to see in writing what the other counter proposal is to this because I want to have time to think about it.

GENERAL DAVIS: Does paragraph 5 in any way answer what you are talking about?

MR. CRESAP: I think it does. I think under this proposal it takes care of that.

GENERAL DAVIS: Let's say that this subject on the quality control water from Federal reservoirs is an item that is wide open and an awfully hard thing to pin down. We are still back on paragraph 3a.

MR. VANDERTULIP: Paragraph 3. What Louisiana is proposing is mainly that from Denison Dam to Index gaging station, State line - and divide (above 400 cfs at Index gage) 1/3 to Oklahoma, 1/3 to Texas, 1/3 to pass, and then using the State line gaging station, Arkansas and Louisiana to take this water from the main stem, plus water from the tributaries, as I understand it below existing Federal reservoirs which would be Millwood and Texarkana, and then divide it 1/3 to Texas and 1/3 to Arkansas, and 1/3 go downstream - that's above 650 cfs.

MR. CRESAP: That 1/3 business was based on that the fact that there was a control of 150,000 acre-feet that you were entitled to if this was the concensus that this should be deleted - because we'd always be changing percentages again - so John has worked out some approach.

MR. VANDERTULIP: For discussion purposes - first at Denison Dam (draws on blackboard). If we take River Miles under present conditions, Denison Dam -- 675, Index -- 430, Arkansas-Louisiana State Line -- 328. The total distance from Denison Dam to the Arkansas State Line, 675 minus 328 = 347. Looking at the map there from Denison Dam to Index would be the total Oklahoma distance, 675 minus 430 = 245 miles. The Arkansas distance would be from Index to the State Line. Arkansas would be the difference here of 102 miles. For Texas I took this 245 for convenience - I took 1/4 of this distance of 102 miles. I just took Texas 245 + 1/4(102) = 270. Now if we add the 245 and the 270 and the 102, that comes out to 617. If we take these various percentages of this total, we come up with Oklahoma having a percentage of 39.7 percent, Texas 43.8 percent, and Arkansas 16.5 percent. Well, that didn't look too good, so then I went back to the 1/3 above the 400 and the 1/3 above the 650, and made an overall adjustment so that above Index, above 400 cfs above Index, you are going to have 2/3 of that total flow that could be used. 1/3 and 1/3 use, and 1/3 coming downstream. What I am taking there is about 41 percent to Oklahoma, 26 percent to Texas; this comes up to 67 percent, with 1/3 downstream, of those flows above 400. Then the 650 at Arkansas- Louisiana State line, 18 percent to Texas, 49 percent to Arkansas, and 33 percent to Louisiana. Oklahoma had 41, Texas had 26, and then 18 percent gets that up to 44 percent which is what I was using as a control.

MR. CRESAP: The only thing is that what you have done is to change actually the division of water between Arkansas and Louisiana, because Arkansas was to have had 1/3 and now you have made it 49 percent of that water. You see, you've really changed the percent of more than the total available. Under the 150 it was, of course, intended and understood in my mind that that restricted you from getting more than this amount anywhere along the river. I knew you'd get some up above.

* * *

MR. CRESAP: No, what I am saying is that you have upped the amount that Arkansas would have without changing the amount Louisiana would have.

MR. VANDERTULIP: Yes, but we might take it off.

MR. CRESAP: It doesn't make any difference * * * . I object to this particular lower part of the division because of the reason that you have made yours come out right but * * *.

MR. VANDERTULIP: Reads from draft. "The rate of removal * * * Arkansas-Oklahoma-Texas State Line, and the Arkansas-Oklahoma State Line shall not exceed the amount equal to 1/3 the rate of flow at the Arkansas-Louisiana State Line in excess of 650 cfs.

MR. CRESAP: With 150,000 acre-feet only that can be taken. Now we have thrown out the 150,000 and when we do that then we have to consider the percentage. Therefore, on the basis of that, since we are permitting the other states to any amount - and your suggestion (ours is being thrown out) - on the same basis, I am saying we can't go for this 1/3 any more if we have to renegotiate percentages.

MR. VANDERTULIP: Arkansas may feel differently.

MR. CRESAP: I would say that you take the 18 percent and take the rest and divide it in half, because that is the only one we'd be getting, and the other states have the right to all the water above the reservoirs is what I'm objecting to.

* * *

MR. VANDERTULIP: Actually, what we are talking about is here is a range of numbers.

MR. CRESAP: I would like to ask Arkansas if they would agree to the 41/41 for the present time.

MR. FRANCIS: We have been working on a 50/50 basis. The 41/41 is still a 50 percent division.

MR. _____: Let me get it clear. This 650 cfs - in excess of that. In other words, flows above Millwood * * * Arkansas would get it. Likewise, Texarkana over in Texas. That is, as I understand it, whenever the flows in the main stem and from these tributaries below these main reservoirs, whenever they are in excess of 650 cfs down here they would be divided up 18, 41, and 41. At the same time for study purpose, whenever it is above 400 cfs and at the same time above 650 cfs downstream, we would get the 41 percent of that available for Oklahoma, 26 percent for Texas, * * *.

MR. VANDERTULIP: It would be something that would work better on our analog computer.

MR. FRANCIS: I have a question of the Chairman. Do you have the information as to the quantity of discharge from the Millwood down * * * .

MR. CRESAP: 155 cfs.

MR. _____: That is your water quality control.

MR. VANDERTULIP: Are we talking about running this through on historical conditions?

MR. STOUT: * * *

MR. CRESAP: I would say it is up to the other states if they want to go into that.

MR. OAKES AND OTHERS: * * *

MR. VANDERTULIP: General, what we had discussed at breakfast was the possible deletion in paragraph 3 of item b. I would delete item b(1) and (2), which has the 150,000 acre-foot figure. This was done as a tentative type thing for discussion purposes. Of course, the deletion of subitem b(2) had to do with diversion from the basin.

MR. JAMES: That will take care of the whole thing down to 4.

GENERAL DAVIS: By the deletion from the letter "(b)" down through the word "basin", beginning at line 9.

MR. VANDERTULIP: And then these percentages that we have discussed here would be given to see what amount of water would be involved in each state in the proper time sequence using historical data modified for operation of reservoirs constructed.

GENERAL DAVIS: Let me see. What you are proposing is the deletion from line 1 down to line 9, and the substitution therefor of some percentages based on historical flows.

MR. CRESAP: It might be based on equitable apportionment.

MR. VANDERTULIP: In paragraph 3 in subitem 3, these percentages we are talking about developing would be in place of this 1/3-1/3 type of thing.

MR. CRESAP: Paren 3 would stay with modifications of percentages, but you'd delete everything down to 3.

MR. CLARK: Then (3) would not apply to rate of removal but would apply to total quantities.

MR. CRESAP: That's right. They consider you could take out as much as you wanted as long as you're inside that percentage.

MR. VANDERTULIP: We did discuss at breakfast that if you had a steam electric plant on the river and its used for once-through cooling, even though we have this 400 cfs situation - since you were not taking a depletion but just once-through - this could be done. This is the language which we want.

GENERAL DAVIS: As far as our treatment is concerned in major paragraph 3, you propose the deletion of those eight lines in toto and then modifying what is now (3), modifying the 1/3 that's indicated there by some equitable percentage not now agreed upon. Is that correct?

MR. CRESAP: Tentatively proposed, but not agreed on.

GENERAL DAVIS: Let's see which one of these percentages we're talking about - the 18, 41, 41?

MR. JAMES: Except in the lower part - 41, 26.

* * *

GENERAL DAVIS: And above Index the percentages are 41 percent Oklahoma, 26 percent Texas.

MR. McKINNEY: With the remaining 33 percent going on down the river.

GENERAL DAVIS: Below Index, 18 percent Texas, 41 percent Arkansas, and 41 percent Louisiana. This would be the trial distribution.

MR. VANDERTULIP: The only way to effectively do this type study is to use * * * unfortunately we don't have it.

* * *

MR. JAMES: Mr. Chairman, we can make figures all day long here; it can extend through the whole day based on some basis. John makes them on river miles. We make them on contributions or drainage area, and we can make them on anyone of a dozen other bases. Sometime or other we're going to pick some figures that we can agree on. The drainage area will vary as developments occur. This will be a complication that will cause a tremendous amount of administration by the Compact Commission. If we have to make engineering studies of contribution, they would have to be made periodically. For my part, I would agree to all of this - it looks somewhere close to where the answer ought to be. Although river miles might not be the device I'd use to arrive at those numbers. Go back to page 1 on that next to last line where it says "paid for or purchased by a state or local interest". If that is construed to cover the allocation of water contracted for these districts or communities as they need it. * * * maybe 15 or 20 years. In which case his contention is that as long as

that is not being used, he would like to share equitably in that amount of water because it will not be used if it is not paid for. Now then, if this language adequately protects that district when the time arrives, then the language as it is is all right. To me, it is a little less than clear. This contract earmarks at some future time that water, and doesn't permit by usage downstream claims * * * .

MR. CRESAP: * * * add which has been paid for now or in the future.

MR. JAMES: You have got to protect that district. What could happen is this: We'll talk about salt water later. If Louisiana came up 20 years from now and says "No, you can't take that water because its * * * ". Then that would foreclose going through with this contract that's already in existence. The wording you suggest solves that problem and makes it clear. * * * .

MR. FRANCIS: A question at this time would be this next to the last line on page 1. If we change that to "paid for or purchased now or in the future by a state or local interest, it shall remain the property of said state, etc."

MR. JAMES: Turn over on page 2 in the top line and cut out (b) down to (3), which is line 9 - and then from 3 on you change these percentages that John has computed there on the board.

GENERAL DAVIS: In discussing this I'd like to run through this, indicating what I understand is still the remaining problem on this thing. Outline what we do to arrive at solutions.

MR. JAMES: Well, we have got to arrive at some figures somehow and make those figures * * *.

GENERAL DAVIS: I was wondering in the way you got these percentages, I think you did it on the basis of mileages.

MR. VANDERTULIP: I started trying river miles first and then generally discarded this, trying to balance with the 1/3, 1/3, 1/3. In other words, what I said was that 1/3 of the water above 400 cfs was going to come past the Index gaging station, and took the 2/3 and split it between Oklahoma and Texas [illegible] the Texas portion, roughly on a river mile basis, to get that additional 18 percent on the area between the State line.

GENERAL DAVIS: Then it seems to be this - that Texas would, since you have the computer and the capability of doing this, could prepare subsequent to this meeting some time, work up and explain on a piece of paper how you developed the proposed percentage of distribution and the basis for it. There might be two or three different

methods of computation that you could use. You would wind up with two or three groups of figures of percentages which you could throw before the Compact Commission and they could make up their own minds.

MR. VANDERTULIP: The percentages we have on the blackboard - 21 and 26 percent and 18, 41, and 41 below Index seemed reasonable for discussion purposes. It was our thought that we would check out what this is in amounts of water.

GENERAL DAVIS: Let me suggest that we continue to go through the Louisiana paper on Reach 5, then I'll try to go back and to set up what has to be done in order to come up with a proposal.

MR. VANDERTULIP: Paragraph 4. We had deleted the first sentence; this was in the discussion yesterday. It was our feeling this morning that the remaining part of paragraph 4 should apply to the entire basin and not just this reach. This is an overall statement which would cover the entire basin and not just this one specific reach.

MR. FRANCIS: This again would, in a sense, be taken care of in the general provisions of the Compact.

MR. VANDERTULIP: Yes. Likewise, any state that makes importation into Red River would get credit for it. Paragraph 5 is the one that we had some discussion on and have had some here today. It reads: "Any quantity of water released or discharged from a federally constructed dam which has been assigned by the United States Government for some specific downstream purpose shall not be included in the quantity of water which can be removed from Red River as specified in paragraph 3". Now in Louisiana's printed discussion, they point out that any water released from Federal reservoirs for some specific downstream purpose; such as, quality control, navigation, fish and wildlife projects, etc., will not be included in the amount of water which can be removed from Red River in accordance with paragraph 3 above. My immediate question was: Does this include hydroelectric power?

MR. CRESAP: No.

MR. VANDERTULIP: So that hydroelectric power releases from Denison Reservoir could be diverted in accordance with paragraph 3, and we might arrive at the percentages there as long as the flows are above 400 cfs above the control point. Aside from that, I don't see that this would be a problem for the State of Texas. This is strictly an Arkansas and Oklahoma question, so I yield to them. The only releases that I know of would be mosquito control releases on Texarkana that we would be involved in. That is already provided for between Texas and Arkansas.

GENERAL DAVIS: Is that a downstream water use?

MR. VANDERTULIP: Well, it is a specific release.

GENERAL DAVIS: On the lake or downstream?

MR. CLARK: Well, they usually bounce these pools to control mosquitoes in the lake.

MR. VANDERTULIP: Still we are talking about 10 second feet which is not very much.

GENERAL DAVIS: Well, then, as far as Texas in concerned, does paragraph 5 appear to be acceptable to you?

MR. VANDERTULIP: Yes, so long as we have some language in here and in the final discussions to relate to power releases.

MR. FRANCIS: Well, just write that in here.

MR. CRESAP: I think it needs to be in the discussion part of the Compact because too much * * * I would say, like the one you showed to us this morning, that it would be part of the interpretation.

MR. VANDERTULIP: You may have a joint hydroelectric power releases from power plants and others where it may get sticky. Hydropower would not be included in it.

MR. JAMES: Mr. Chairman, I'd like to ask a basic question on this point. Who designates the source of water? Who makes the application for navigation * * * ? where is that going to come from?

GENERAL DAVIS: In the final analysis, the Federal Government would have to make releases from reservoirs under control of the Federal Government to provide the water for navigation.

MR. JAMES: The reason I bring that up is because I can see how this might be a thorny question. Would the water for navigation be allocated somewhat in proportion to the benefits?

* * *

MR. VANDERTULIP: Either.

MR. CLARK: The only point that's been made on the main stem of the Red River is that flows are sufficient for navigation purposes.

MR. JAMES: What you are saying is that this provision is adequate to take care of navigation

* * *

MR. CRESAP: It is just above the Lake O' the Pines. They have a reservoir there to take care of navigation.

GENERAL DAVIS: I think that was ground into the report merely to provide a price.

MR. CLARK: Right, to provide a price tag for supplying water for that navigation. There may be a lot of things that may be done to affect the amount; such, pump back where could pump it back up and use it for the same lock again.

MR. _____: Another would be to build above Lake O' the Pines, Cypress Creek, where you can swap - and where you can develop both flood control and water consideration.

MR. CLARK: This may be a trade-out. John, there are many things that we will consider. In the comprehensive report, we will consider them. Releases have to be made from the Lake O'the Pines where we have a lock through that dam. It takes just as much water to operate that one lock as all the locks. We would consider water supply also in the upstream reservoir.

MR. VANDERTULIP: I see, * * * put a big reservoir upstream.

MR. CLARK: That's correct.

* * *

MR. VANDERTULIP: Then you would be developing that water supply which could not otherwise be developed.

MR. CLARK: I think you are right that these things must be considered and this possible swap-out or developing for other purposes will be done for the comprehensive report. We felt that by taking the Harvard Reservoir and simply providing a single-purpose reservoir would probably represent about the highest cost for navigation.

MR. VANDERTULIP: The only problem we have at Harvard is * * * .

* * *

MR. CRESAP: Actually what we are considering is something that is sort of a -- this compact is for the future development of the basin. The navigation project is something that can be expected in the next five or ten years -- to be in operation.

MR. CLARK: You may be rather optimistic.

MR. CRESAP: So, really you have to have something covering the future needs and this sort of thinking sets up the requirement where navigation water is separate - if in the future they have to supply them some place.

MR. NELSON: The Corps of Engineers; that's their problem.

MR. CLARK: For whatever bearing it has on the Compact, a look at the schedule for the interim report may be of interest. It is scheduled to come from the district at the end of June of this year, 1965. It will take some little time to process that through before it reaches Congress and takes some more time before it is authorized. Now, the comprehensive report is now scheduled for completion in 1968. There's no question in my mind that we will have the answers to many of the questions before we undertake construction of the navigation project.

(Discussion of inter-relation of Compact, interim report, and comprehensive report.)

GENERAL DAVIS: What about paragraph 5? Going back to Oklahoma, I think the point there is to make sure to include in the language what we want in the releases for downstream purposes. Why don't we just stick it in the paragraph there?

MR. CRESAP: The only thing I was thinking was that that ought to be in the discussion part of it because there may be something else that we will have before this is over. When you specify something, you finally come up and say "That is it".

GENERAL DAVIS: O. K., then, item 6.

MR. VANDERTULIP: "Water for irrigation purposes shall be charged to the quantity of water allocated to that state in paragraph No. 3." My only thought on this, General, is that I don't disagree with this at all, but if we are going to enumerate just one purpose - we've agreed on all purposes - or carry it in the discussion that the uses to be made by the states include municipal, industrial, irrigation * * *.

MR. FRANCIS: This morning in our discussion, we agreed tentatively on water for all beneficial purposes shall be charged to the quantities of water allocated to a state for use.

MR. NELSON: That was consumptive use.

MR. CRESAP: I put that in because irrigation water was one of the main discussion points in the past. So I thought I'd better put this in again to bring it forth. I really see no need to leave it in at all and in discussion of anybody's interpretation, make mention of it.

MR. VANDERTULIP: Actually, paragraph 4 on transbasin discussion now "in basin use". That can be deleted and make reference to discussion of paragraph 3.

GENERAL DAVIS: Item No. 7.

MR. VANDERTULIP: I think we can't help but feel that the attorneys will have to go into more detail before - in fact, what we're saying is that the Red River Compact Commission might be a police agency.

GENERAL DAVIS: It comes down to whether it is a part of the overall Compact - an overall provision which will not apply to specific reaches. In other words, what we should do here is to delete this and then this subject should be treated in the general overall provisions of the Compact.

MR. CRESAP: Yes, but I'm quite sure Calvin may not agree.

MR. VANDERTULIP: After you get allocation of water, how do you administer this?

* * *

GENERAL DAVIS: Then, if it pleases the Committee here, I suggest that we turn back to page 1 of the reach.

MR. VANDERTULIP: It may be that after we arrive at something for each reach of stream and we start to look at these, we may have to go back to each reach as far as the restrict phrases. The Ouachita may have a different administrative treatment than Reach 5 or Reach 2 or any of the others. That would create quite an administrative problem.

(BREAK)

GENERAL DAVIS: I would like to take now the Louisiana proposal for Reach 5 dated 1 April and go through the paragraphs we have discussed for the purpose of summarizing the views of the Commission on each of the paragraphs of this proposal, and I will attempt to phrase what I think is the view of the Commission on these paragraphs, and if I don't state it properly, I ask that you assist in the language. In addition, set forth who and when the revisions would be done. In paragraph 1, in the second line, we delete the word "in" and substitute "from". It now reads: "use of the waters from." In that same second line, strike out the two words "or subtributary" and strike out those same two words on the fifth line. Reads: "The States of Arkansas, Oklahoma, and Texas shall have the free and unrestricted use of the waters from that part of a tributary of the Red River lying within each respective state above any dam now constructed or to be constructed by the Federal Government in the respective state and on that tributary." Now, we have a parenthetical sentence following which would not necessarily appear in this part of the Compact, but the sense of that parenthetical remark would appear somewhere in the general overall coverage. There are also a few questions as to the language in this first paragraph to make it a little more inclusive and I'm referring to the statement on dams constructed by the Federal Government.

MR. VANDERTULIP: I just discovered something, General.

GENERAL DAVIS: All right.

MR. VANDERTULIP: This would be an insertion after the phrase "Federal Government". "Or from reservoirs now constructed or which may be constructed by non-Federal entities in the respective state on a tributary which does not have a dam constructed by the Federal Government or upstream from a dam constructed by the Federal Government, provided that such non-Federal development above the existing Federal project shall be consistent with the existing Federal project."

MR. _____: It could read: "or from reservoirs not constructed or which may be constructed by non-Federal entities in the respective state on a tributary which does not have a dam constructed by the Federal Government, or upstream from a dam constructed by the Federal Government, providing that such non-Federal development above an existing Federal project shall be consistent with the existing Federal project."

MR. NELSON: Can't we just say "Federal Government or State"?

GENERAL DAVIS: Let's take that lower clause and put it in. Let's pass on to paragraph 2 and come back to No. 1. Paragraph 2 is to be deleted.

MR. CRESAP: Subject to the conclusion of this other paragraph 3

GENERAL DAVIS: Paragraph 3 on the next to the last line of the page. Insert after the word "purchased" the words "nor or in the future" so that (a) of paragraph 3 reads: "Any water released from storage which has been paid for or purchased now or in the future by a state or local interest shall remain the property of said state or local interest and said entity shall have the use of this water." Then strike the remainder of that first line on top of the page 2 down through the words "Basin" and the first word on the ninth line, and then 3 on would be revised. Then substitute the letter "(b)" for "(3)".

MR. CRESAP: I think you have to say - after that semicolon - "and subject to (b)".

GENERAL DAVIS: Now, then the remainder of the major paragraph 3 would remain as is, except that where we refer to 1/3, the rate of flow be stricken and other percentages - to be submitted by Texas and agreed to by the Commissioners - would be substituted. Then where we refer to, as presently written, 1/3 the rate of flow, is that what we are talking about?

MR. VANDERTULIP: Yes, sir. I think we are going to have a little language modification here by calling that "b". This Item 3 refers to all waters released or spilled on the tributaries. This "above 400 cfs" will include all flow below these dams - not just releases or spills. Some flows come from uncontrolled tributary areas that come into the Red and its above 400 cfs. It doesn't make provision for use of these uncontrolled waters. I think this is just language at this point.

GENERAL DAVIS: What are you proposing then?

MR. VANDERTULIP: It would involve these releases or spills from paragraph "b" and also uncontrolled water coming into the Red River. This is just a matter of getting some language.

MR. OAKES: If you don't specify the water, wouldn't the fact * * * .

* * *

GENERAL DAVIS: Is what you are proposing here on page 1, line 4, of paragraph 3, after the word Denison Dam insert "and all water from uncontrolled drainage areas"?

MR. _____: Yes.

GENERAL DAVIS: All right, with this wording then, do we strike out "(a)"? Well, we will keep that, then go to (a) and (b).

Again going to the latter part which is now subparagraph (b) of paragraph 3, in the middle of page 2. All we are proposing to change in that subparagraph is to strike 1/3 and to provide some additional percentages for that. Is that correct?

MR. NELSON: Of course, it will have to be stated as a percentage for each state.

GENERAL DAVIS: That's right. It will not be necessarily the same for each one. So it will be a percentage for each state. Is that your correct summation on it?

MR. VANDERTULIP: Yes, with one little language change to make it consistent with what we said in paragraph 1. For the statement "or that part of a tributary below a federally-constructed dam", we might put in "or that part of a tributary below a dam permitted by paragraph 1" or something like that.

GENERAL DAVIS: There are two places in paragraph 3 where we refer to Federal dams. In the first part of paragraph (b) and also on the last part we have that. Do you want to modify that?

MR. VANDERTULIP: I missed that one. Now, we could use "by a dam permitted in paragraph 1" in each case.

GENERAL DAVIS: It now reads in paragraph 3 "all waters released or spilled on any tributary of the Red River below Denison Dam from the most downstream dam" - now if we refer to paragraph 1 we could - could say "Now constructed or to be constructed in accordance with the provisions of paragraph 1." When you get paragraph 1 right, then I think you may have it.

GENERAL DAVIS: Well, that same sort of statement should apply to paragraph (b) as well. All right, that should be referred back to paragraph 1.

* * *

MR. CRESAP: I have not had the opportunity to see the repercussion of these changes on these uncontrolled channels and I'd like to withhold my agreement to these changes on that particular part of it until I've had a chance to study it. I don't quite understand what this is going to do to the overall proposal. I want to look at all paragraphs.

GENERAL DAVIS: You still have your reservation on paragraph 2.

MR. CRESAP: That's right.

GENERAL DAVIS: Let's go down to paragraph 4. The proposal here is to delete all of paragraph 4 and make sure the provisions of it are covered in the overall statement applying to the entire basin.

MR. VANDERTULIP: Delete that first sentence.

GENERAL DAVIS: On paragraph 4, delete the first sentence entirely and see that the remaining sentence is included in an overall statement. On paragraph 5, I think the proposal was to leave that in as is. Bring up in the discussion of the fact that, for example, water for hydroelectric power purposes was not a downstream purpose for water. Paragraph 6, the proposal is to delete it but to be sure to include it in the discussion of paragraph 3. Any questions on that?

MR. FRANCIS: This paragraph 6 has been made reference to in paragraph 3. So it's deleted in its entirety.

GENERAL DAVIS: Yes, delete but include in discussion. Paragraph 7 is deleted from this Reach 5, but it should be again, like other things, covered in the overall conditions of the Compact. You might, particularly, say that portion which relates to the administration of the Compact. Now I think we might turn back to paragraph 1 here. The insert that Vandertulip proposes -"or from reservoirs now constructed or which may be constructed by non-Federal entities in the respective state on that tributary which does not have a dam constructed by the Federal Government, or upstream from a dam constructed by the Federal Government, providing that such non-Federal development above an existing Federal project shall be consistent with the existing Federal project."

MR. CRESAP: I'd like to have John explain this item.

MR. VANDERTULIP: If you have a tributary without a Federal project, it would permit a non-Federal entity to go in and construct a dam on that tributary and give the state, where this occurs, the same right to the use of the water. On one of these other small creeks where we don't have a Federal project at the moment - or may not have in the future, you can do this. Or, if you have a project - non-Federal - which may come in upstream from an existing Federal project, this could occur as long as it was consistent with the non-Federal project.

MR. FRANCIS: I want to be sure of what you are saying. Reads: paragraph 1 (as modified to this point).
Doesn't that cover what this insertion is?

MR. CRESAP: No, because he's talking about private dams.

* * *

MR. VANDERTULIP: Yes, but what I have said here is that if you have a Federal dam on a stream, then the non-Federal development would be above it. Now if you had no development on a stream, the non-Federal dam could go in. What it says is that the local entity shall not go in below a Federal dam and make claim on the water. I still feel that as far as discussion is concerned, that they could be put in a diversion-type structure or something like that - a reregulating structure - as

long as there's not an additional claim in water. We're not precluding a diversion structure where industry may want the flow on that tributary for diversion purposes, using the releases of water down 30 miles of river channel instead of putting in a pipeline.

MR. CRESAP: I understand is better, and may be able to withdraw some of my objections.

MR. VANDERTULIP: I think the language could be improved on, but if it is an uncontrolled tributary, neither state would be restricted * * *

GENERAL DAVIS: Have you agreed to the wording or not:

MR. JAMES: I think it's all right.

MR. CRESAP: I think John has explained this sufficiently now that this does not change the intent of this part of it. Just adds to some of the problems we've taken care of, so I withdraw those objections that I had on 1 and 2.

GENERAL DAVIS: Gentlemen, I would suggest that we do one thing here... We have gone back through Reach 5. We could do, we could attempt, while we are all at lunch, to have someone redraft this in the light of discussions so we could have a fresh draft on Reach 5. * * *

MR. VANDERTULIP: Yes, and what I think we could do - with one word change, - in that insertion strike out "in the respective state and on that tributary" after "Federal Government". Insert what I have there and state "or from reservoirs now constructed or which may be constructed by on-Federal entities in the respective state on that tributary". That takes the language that Dan had.

* * *

GENERAL DAVIS: We will have just 3 paragraphs. Well, then, we'll reconvene at 1:00 P.M.

(B R E A K)

GENERAL DAVIS: Gentlemen, you have in front of you a draft marked Reach 5 and dated 2 April, which is a redraft of the proposal submitted by Louisiana, as modified by discussion this morning.

2 April 1965

REACH 5
RED RIVER BETWEEN DENISON DAM
AND THE
ARKANSAS-LOUISIANA STATE LINE

1. The States of Arkansas, Oklahoma and Texas shall have the free and unrestricted use of the waters from that part of a tributary of the Red River lying within each respective state above any dam now constructed or to be constructed by the Federal Government or above any dam now constructed or which may be constructed by non-Federal entities on a tributary which does not have a dam constructed by the Federal Government, or upstream from a dam constructed by the Federal Government, providing that such non-Federal development above an existing Federal project shall be consistent with the existing Federal project.

2. All waters released or spilled on any tributary of the Red River below Denison Dam from the most downstream dam now constructed or to be constructed in accordance with provisions of paragraph 1, all water released or spilled from Denison Dam, and all water from uncontrolled drainage areas shall not be diverted before said water passes the Arkansas-Louisiana State Line, except that any water released or discharged from storage in a reservoir which has been paid for or purchased now or in the future by a state or local interest shall remain the property of said state or local interest and said entity shall have the use of this water;

Provided that the rate of removal of water by the State of Oklahoma or the State of Texas from the Red River, or that part of its tributary below a dam constructed or to be constructed in accordance with paragraph 1 on that tributary, between Denison Dam and the Arkansas-Oklahoma-Texas State Line shall not exceed the amount equal to [percentages for states to be developed] the rate of flow at the Arkansas-Oklahoma-Texas State Line in excess of 400 cfs; and

Provided further that the rate of removal of water by the State of Arkansas, or the State of Texas from the Red River, or that part of its tributary below a federally constructed dam on that tributary, between the Arkansas-Oklahoma-Texas State Line and the Arkansas-Louisiana State Line shall not exceed the amount equal to [percentages for states to be developed] the rate of flow at the Arkansas-Louisiana State Line in excess of 650 cfs.

3. Any quantity of water released or discharged from a federally constructed dam which has been assigned by the United States Government for some specific downstream purpose shall not be included in the quantity of water which can be removed from Red River as specified in paragraph 2.

GENERAL DAVIS: It is my hope that we can look over this thing and agree or comment on it, and fix it up so that we can put it away, except for the computation of percentages.

MR. VANDERTULIP: I have two small suggestions. In the first paragraph, third line, it would be a little clearer if we put a colon after the word "above" in the third line and then insert an a in brackets, then in the fourth line after Federal Government, put a " , or (b)". The (a) is the Government project and the (b) is the non-Federal entity.

GENERAL DAVIS: Do we need the comma after Federal Government on the seventh line? OK, leave it. Now is the "providing" that appears on the next line - does that apply only to (b) or to the whole works?

MR. VANDERTULIP: It would pertain to both (a) and (b).

MR. CRESAP: That couldn't be. As it is set up, goes with (b) only.

MR. VANDERTULIP: Well, that "providing that such non-Federal developments above an existing Federal project shall be consistent with the existing Federal project", that would apply to both (a) and (b).

MR. FRANCIS: It can't because you are referring to non-Federal development and (a) is Federal development.

MR. McKINNEY: I think the attorneys may want to look at this language and put it in proper form.

MR. VANDERTULIP: The only other suggestions on page 2, the second paragraph, the third line, we have that "federally-constructed dam" and I wonder if we could borrow the language from the first paragraph, page two, "part of its tributary below a dam constructed or to be constructed in accordance with paragraph 1".

GENERAL DAVIS: Continue with "On that tributary, etc."

MR. VANDERTULIP: Yes.

GENERAL DAVIS: We are just using the same language as in the paragraph above.

MR. NELSON: In 2 on the first page, is that clear? It says * * * all water released from Denison Dam * * * . Does the provision tie this sufficiently to explain that to everyone? Do you think that's clear enough, Guy?

MR. JAMES: No, I don't think that is clear. Not clear at all. All waters released or spilled - now there's three kinds of water - (from Denison, from other dams, and from uncontrolled drainage areas). Now this next provides only to that water that can be removed - and the only water that can be removed is that which is paid for. In other words - we still don't have - do not reserve any right to any of the so-called free water.

MR. CRESAP: I read that as being on this second page.

MR. NELSON: You might need "and provided".

MR. JAMES: Well, you are talking about the rate of removal of certain waters. What waters are you talking about?

MR. NELSON: It is in paragraph 1.

MR. JAMES: We are talking about all waters released that haven't been paid for.

MR. CRESAP: Paragraph 1.

MR. NELSON: Is that clear to you, John? This water released from a reservoir for any reason - if it weren't for a specific purpose - Oklahoma should share in that water.

MR. _____: It says it can't be diverted before said water passes the Arkansas-Louisiana State Line.

MR. CLARK: It seems to me like it would be much better here in paragraph 2, - rather than saying "shall not be diverted" it would be better to make a positive statement that water diverted before it passes the Arkansas State Line shall be diverted in accordance with the provision of this paragraph.

MR. CRESAP: We could say "shall only be diverted in accordance with".

MR. CLARK: I don't object to the word "only".

MR. VANDERTULIP: Not this "only" shall only be diverted, I think would create some complications that way. I think the idea of "in accordance with" is a way of nailing it down.

MR. CLARK: We have these 3 classes of water. We can say "any water diverted before said water passes the Arkansas-Louisiana State Line shall be diverted in accordance with the provisions of this paragraph."

MR. CRESAP: "Can" be diverted.

MR. JAMES: Let's say that "and water from uncontrolled drainage areas may be diverted before said waters pass the Arkansas-Louisiana State Line, except that waters allocated to a downstream purpose must pass the Arkansas-Louisiana State Line."

MR. OAKES: Yes but you might release it for a specific purpose before it reaches that point.

* * *

MR. CRESAP: He didn't say downstream purposes - he said all may be diverted before said water passes the State Line except * * *.

MR. CLARK: I don't know why you even need this complication of the revision.

GENERAL DAVIS: Strike out the two words "shall not" and substitute "may".

MR. VANDERTULIP: Yes, and you'd have, "May be diverted before said waters pass the Arkansas-Louisiana State Line in accordance with the following provisions: (a). Strike that "except." Then on the next page, strike "provided" and put (b) and strike "provided further that" and put "(c)."

GENERAL DAVIS: Let me read this paragraph 2, "All waters released or spilled on any tributary of the Red River below Denison Dam from the most downstream dam now constructed or to be constructed in accordance with provisions of paragraph 1, all water released or spilled from Denison Dam, and all water from uncontrolled drainage areas may be diverted before said water passes the Louisiana-Arkansas State Line in accordance with the following provisions: (a) Any water released or discharged from storage in a reservoir which has been paid for or purchased now or in the future by a state or local interest shall remain the property of the said state or local interest and said entity shall have the use of this water; (b) The rate of removal, etc; * * *; (c) The rate of removal of water by the State of Arkansas or by the State of Texas from the Red River, or that part of its tributary below a dam constructed or to be constructed in accordance with paragraph 1 on that tributary, etc."

MR. NELSON: One comment on the word "all" - .

* * *

GENERAL DAVIS: Strike out "all" in the beginning of that paragraph. Then on the word "waters" - should be water.

GENERAL DAVIS: How does it look to you now? Now with the "waters"cut back to the singular, and striking out the "all's"?

MR. JAMES: All right.

MR. CLARK: And Texas is coming up with the percentages.

GENERAL DAVIS: I guess the question before the Committee here is how you'd like the percentages. Do you want Texas to get it in various ways and present it to the Committee at a subsequent time and explaining how they got it.

MR. JAMES: Provided they don't reduce our allocation of water.

* * *

GENERAL DAVIS: Do you think we could come back here to another meeting some time and reach agreements? * * *

MR. JAMES: Yes, as long as they don't change the percentages, we will. Anything that's above what he's got up there, we'll take that.

* * *

GENERAL DAVIS: We have mentioned from time to time the fact that we would include certain coverage of Reach 5 in our discussion.

When we say that, just what do we mean? Are we going to have, to go along with this Compact, other data?

MR. CLARK: On the Kansas-Oklahoma Compact - here is the Compact itself with the maps and data they have to explain the basis of the Compact. They take each one of the Compact articles and then have comments on them. Which are supplemental, interpretive comments from the Compact Committee. These give reasons behind each comment.

GENERAL DAVIS: Does this become a part of the appendix. I presume that some of the things the states submitted here yesterday on this, is that grist for the supplements.

MR. CLARK: To some extent. When the lawyers finally get this thing worked out, we will probably have to consolidate all of it.

GENERAL DAVIS: We have some items that carry an explanation. * * *.

MR. FRANCIS: There was one here in the first paragraph - restrictions or agreements to protect the authorized operation of Federal projects that was stricken. Will it be in the general provisions of the Compact? Is that what you refer to?

GENERAL DAVIS: No - we are talking about discussion of items in the Compact.

MR. NELSON: May I tell you why we did it up there? We at first had agreement on the Compact, after the lawyers and engineers had reviewed it. Then we had a meeting and they called on Kansas to explain what they meant by Article I. What does it mean to you? Then Oklahoma told him what they thought it meant. Then we ironed out the differences of opinion and decided each state knew what was meant in the Article. On other Article we did the same thing. At that time, the Federal representative had his consultant sitting there, and, as we went through all this, we had a court reporter taking this down verbatim - and this was made up into a big book and then the Federal representative had his consultant take this and write down what the intent of the Compact was * * * and then we met back to see if the Federal representative interpreted it like the states. That was all agreed on before we signed the Compact. Each state knew what the * * *.

GENERAL DAVIS: Are we in the position, as a follow-up action, to prepare interpretive comments on Reach 5? Or do we wait until we get this whole thing, every reach, locked in position.

MR. VANDERTULIP: I think that while the attorneys are going over all the reaches we would have ample time to get this interpretive discussion.

MR. CLARK: I would think you would need a draft of the entire Compact to see how it would all tie together before you could formalize statements.

GENERAL DAVIS: I was just trying to see if we could attack this before we completed all reaches.

* * *

GENERAL DAVIS: Really what you are talking about is a summary of the Compact for the Commission's use until we develop a formal supplement to make sure we have on hand the things we discussed in working out the draft for Reach 5. I think first what we really need to do then, in addition to this, is to work up some notes on things which have been discussed here that were determined as being desirable to include.

MR. NELSON: All this discussion today will be just backup until we get ready to settle what we mean.

GENERAL DAVIS: I think we are almost ready to wipe off Reach 5 here today, except that we have the percentages to work up. As I understand it, we will look to Texas to work those up and submit them, with an explanation of the basis for them, prior to our next meeting.

MR. VANDERTULIP: We will run a check study * * * is involved in these percentages that we thought were somewhat in the ballpark of reason. After these results are obtained, we will distribute and have everybody look at these and see if the percentages seem reasonable.

* * *

MR. VANDERTULIP: General, I don't think we could get that percentage because with the 650 cfs the Arkansas-Louisiana State Line; when it's down to 650 sec.-feet 100 percent of it goes to Louisiana. So we could not have an equal percentage on four states.

MR. OAKES: Don't misunderstand me, I did not say * * * I'm talking of the water in excess of these low flows. That can be figured for a specific period of flow. * * * .

* * *

MR. VANDERTULIP: Let me say, Mr. Cresap, we would sure appreciate having Mr. Oakes to help us out. That opens up a whole lot of cans of beans.

* * *

GENERAL DAVIS: I wonder if we could leave this chore here with Texas, and if Louisiana wants it in some additional way that Texas feels it can crank out, I am sure they will.

MR. CRESAP: I'll have Mr. Oakes explain this to me.

GENERAL DAVIS: Does that sound all right with you, John?

MR. VANDERTULIP: Yes.

Let's bid adieu to Reach 5 and go to

GENERAL DAVIS: /Reach 6. (Note - See Reach 5 in Summary for last draft.) We then go * * *

MR. JAMES: I want to warn you that it's all settled unless Louisiana and Texas object and there's no further work. We got it all worked out. On page 5 of minutes of 33rd meeting, we took that Reach 6 and took off the bottom four lines of the first paragraph. Paragraph 2 stays as is. Paragraph 3 and 4 are deleted and that's it.

MR. FRANCIS: Fine, except I want to make a note here about the last paragraph that it will also be taken care of in the general compact. Its just one of those things that will be taken care of in other places.

MR. CRESAP: I have written a discussion on Reaches 1 to 4 and 6 through 7. These are mostly small comments. On Reach 6 I say that theoretically Oklahoma could construct a small dam in the bed of the Little River at the Oklahoma-Arkansas State Line and have the right to use all the waters in the Little River Basin in Oklahoma. It is my thought that the dams mentioned in the first paragraph should be restricted to the major federally constructed dams,; such as, Broken Bow, Pine Creek, etc. It is my understanding that is the intent of this but it does not say so. Again we feel that they * * * that protection of the authorized reservoirs should be mentioned in some other paragraph.

MR. FRANCIS: If I may, Mr. James, try and clear out this because on these minutes they wanted the inclusion of the word "dam" for this downstream area. I believe it pretty well ties it back into the specific things that you mentioned.

MR. CRESAP: It says: "The State of Oklahoma shall have the free and unrestricted use of the water in that portion of Little River and its tributaries in Oklahoma above any and all dams constructed in Oklahoma."

MR. _____: I think the intent was as discussed in the past, that this would be the flows from the Broken Bow Reservoir and from the Boggy and Kiamichi from the Pine Creek.

* * *

MR. JAMES: If you want to restrict them to what did we do back there where we were talking about the non-Federal project?

MR. FRANCIS: That would be this conclusion here that Mr. Vandertulip came up with.

* * *

GENERAL DAVIS: In other words, paragraph (a) for Reach 6 would be the same as paragraph 1 for Reach 5, with the exception that "Texas" would be omitted.

MR. VANDERTULIP: I assume that in time Oklahoma may wish to make diversion so you might take the word "in" and make it "from".

MR. _____: Second line, shall have free and unrestricted use of the water "in" changed to "from". That is "from that portion of Little River and its tributaries." * * * now in the second paragraph here about the State of Arkansas, is that still the way it was in the minutes?

MR. _____: Yes.

MR. NELSON: We are in favor of it.

* * *

MR. _____: I raise the question, because as I read that, the only water that Arkansas can use in Little River is what crosses the State Line. Not that that originates in Arkansas.

MR. JAMES: That's what we are talking about there. That * * * paragraph 2 refers to that originating in Arkansas and flows into Oklahoma. We give them unrestricted use of everything in Arkansas. I first had a provision that if they had a dam on that upstream part they would release at least half of it.

MR. CLARK: The only thing that we are talking about is the little piece of stream at the upper end.

GENERAL DAVIS: In other words, the comments set out specifically what this applies to.

MR. VANDERTULIP: My only question is, what about the tributaries which don't cross the State Line? * * *

MR. CRESAP: Under the provisions of Reach 5 they have the right to all the waters above the downstream reservoir in their state. Above Millwood, then, takes care of the whole reach in Arkansas.

MR. VANDERTULIP: I think this is our general understanding, but we have been talking about Little River as such. Perhaps a discussion, then, would take care of the fact that some of these totally intra-state tributaries of Little River, which are in Arkansas, are covered in the provisions of Reach 5.

MR. CRESAP: That's why I said we had to have Sulphur included in 5.

MR. CLARK: This discussion of Reach 6 applies only to the interstate tributaries, which is the thing we are talking about.

MR. FRANCIS: I have no further comments.

GENERAL DAVIS: Any other comments? Texas?

MR. VANDERTULIP: * * * .

GENERAL DAVIS: Louisiana, do you accept Reach No. 6 which we are modifying here?

MR. CRESAP: Yes, sir.

GENERAL DAVIS: Then I understand that Reach 6 is agreed to by the four states, with the understanding that the first paragraph under Reach 6 would be recast to read the same way as the first paragraph of Reach 5 except the name Texas would be stricken and we would use the second paragraph as indicated in our minutes, and remove the third and fourth paragraphs, whose meaning would be included in the general provisions. What reach do you want to take next?

MR. FRANCIS: Reach 7.

MR. _____: Admitted, General, that agreement has not been reached between Texas and Arkansas. That is in the first paragraph "provided that any depletion of quantity shall not be detrimental to the authorized purpose of the Texarkana Reservoir." We just do not feel that that provision is appropriate. Obviously, we would not do anything without having a legal battle if we attempted to change anything.

GENERAL DAVIS: Is this not to be covered by General Provisions?

MR. VANDERTULIP: Yes, but we did not have it in the original exchange of letters between Arkansas and Texas. * * *

GENERAL DAVIS: What you are proposing is the removal of the clause beginning on the second line "provided * * * Texarkana Reservoir."

MR. McKINNEY: Yes, sir.

MR. FRANCIS: I don't have the authorized purposes for the Texarkana Reservoir.

MR. CRESAP: No power. Flood control and water supply, with a minimum release of 10 cfs for fish and wildlife.

* * *

MR. VANDERTULIP: As far as language is concerned, we have "and subject to all other allocations of water provisions of this compact." Simply from a language standpoint, I think this is probably * * *.

MR. CRESAP: On the basis of that, as I see it, Texarkana ... release is covered under Reach 5. This release, then, would be part of the water which would be divided between Arkansas and Oklahoma. Can this be part of that Reach 5 division? This, of course, says that Arkansas would have the right to all water coming out of the dam. This is contrary to the Reach 5. This would have to be revised because Reach 5 changed that.

MR. VANDERTULIP: * * *.

MR. CRESAP: * * * therefore, from the "dam" down, this second paragraph is superfluous. * * *

MR. VANDERTULIP: On the tributaries of the Sulphur River in Arkansas, I don't know whether there is such a thing possible. You might want to make a little development. Well, what this says in gist, you have the Texarkana Reservoir is going to provide for Texarkana, Texas and Texarkana, Ark.

* * *

MR. CRESAP: * * *. This would have to be revised as it stands now to fit such a case as that.

* * *

MR. CRESAP: Actually, this portion of the Sulphur River is covered in Reach 5 already.

MR. FRANCIS: Subject to all other allocations of water provisions of this contract.

* * *

MR. VANDERTULIP: All right, we would still have to put in paragraph 1.

MR. CRESAP: Paragraph 1 still stands because it is above the reservoir. And really there is no need for the second paragraph.

* * *

GENERAL DAVIS: Does someone have some language to put on the table? I understand in the first paragraph we are going to omit the clause starting in the second line running through the word "reservoir" on the fourth line?

MR. VANDERTULIP: We will have to take some of the language from the 2nd paragraph and on the releases for the cities.

MR. CRESAP: Well now, John, let me ask this question. Isn't that already covered in five?

MR. VANDERTULIP: A certain amount has been set up for Texarkana.

MR. CRESAP: It's in there. It's in 5.

MR. VANDERTULIP: Yes, I realize it is. But it doesn't say that Texarkana, Ark. can get additional water out of Texarkana Reservoir.

MR. CRESAP: What I am saying is that for them to get additional water out of there, they have to go through the Federal Government to get added water. Is that right? However, if you want something there about them getting water from the reservoir it's all right with me.

* * *

GENERAL DAVIS: Do you want to leave the second paragraph as it is then?

MR. VANDERTULIP: No, we'll want to change that. We will have to bring that up and put another proviso in the first paragraph.

MR. CRESAP: Are you saying that Texas or Arkansas has the right to obtain water from Texarkana Dam for the use of town of Texarkana, Arkansas?

* * *

GENERAL DAVIS: Do we need the last line of the first paragraph?

* * *

GENERAL DAVIS: As it is, I am waiting for some language as to what Texas proposes.

MR. CRESAP: The way I see it you would have the right to transport it downstream * * *. The question is do you have the right to go into Texarkana Reservoir and get additional water for the City of Texarkana, Ark?

* * *

MR. VANDERTULIP: Where we had crossed out that proviso "except for specific releases from Texarkana Reservoir made for the cities of Texarkana, Texas, and Texarkana, Arkansas" - what this does in effect give * * * also from Texarkana Reservoir. * * * In other words, "Texas shall have free and unrestricted use of the waters of Sulphur River in Texas except for specific releases from Texarkana Reservoir made for the cities of Texarkana, Texas, and Texarkana, Arkansas, subject to providing for a continuous release of water from Texarkana Reservoir of not less than ten cubic feet per second." After that we would have the regular provisions of Reach 5.

GENERAL DAVIS: Then the second paragraph would be deleted.

MR. VANDERTULIP: Yes. We understand under this provision we would have both in-basin use and out-basin use.

GENERAL DAVIS: Any other discussion of this?

* * *

GENERAL DAVIS: Then, gentlemen, for Reach 7, Interstate tributaries, Texas and Arkansas, we would have only one paragraph and it would read as follows, "Texas shall have free and unrestricted use of the water of Sulphur River in Texas, except for specific releases from Texarkana Reservoir made for the cities of Texarkana, Texas, and Texarkana, Arkansas, subject to providing a continuous release of water from Texarkana Reservoir of not less than 10 feet per second." Do the four states agree to that wording? (called each state name and received affirmative replies.) What's the next reach?

* * *

GENERAL DAVIS: Reach 8., Interstate Tributaries, Texas and Louisiana, Cypress Creek.

MR. McKINNEY: General, we had a meeting on Cypress Creek and had extended discussion, and the basic problem that we had is on transbasin diversion. I think we have solved it.

MR. CRESAP: Is this on the basis of the one you submitted to me, or on the basis of the one that I resubmitted to you?

MR. CLARK: Well, you were to meet in February and furnish copies - but we don't have one.

MR. CRESAP: (Hands out copies of his paper, with comments.)

Proposal by Louisiana for Cypress Creek Basin
Louisiana - Texas
Reach No. 8

1. For the purpose of this Compact the Cypress Creek Basin shall comprise the entire watershed of Twelve Mile Bayou above its confluence with Red River.

2. Texas shall have free and unrestricted use within the Cypress Creek Basin of the waters of Cypress Creek, Frazier Creek, James Creek, and other tributaries of this basin in Texas, which flow into Caddo Lake subject to the division of water in Caddo Lake.

3. Louisiana shall have free and unrestricted use within the Cypress Creek Basin of the waters of Cypress Creek, Frazier Creek and other tributaries of this basin in Louisiana, which flow into Caddo Lake subject to the division of water in Caddo Lake.

4. The rights to the use of the water in Caddo Lake in excess of the requirements for navigation and existing uses shall be apportioned on the basis of one-third to Texas and two-thirds to Louisiana.

5. Should the storage volume of Caddo Lake be enlarged, the increased amount of water developed shall be allocated one-third to Texas and two-thirds to Louisiana.

6. Each state shall have free and unrestricted use of the waters of any tributary of the Cypress Creek Basin in that state which does not flow into Caddo Lake, subject to the provision that the quantities of water for existing uses are not reduced.

REACH NO. 8

Comments by Louisiana on the Cypress Creek Basin
Proposal Submitted by Texas

Louisiana does not agree that Shreveport is not in the Cypress Creek Basin. It is recommended that the limits of the Cypress Creek Basin be defined as proposed in Louisiana's revision of this proposal.

Paragraph 1 and 2

Louisiana desires that the phrase "within the Cypress Creek Basin" be inserted after the phrase "free and unrestricted use". We are not in accord with transbasin diversions.

Each state would have free and unrestricted use of the waters of the Cypress Creek and other tributaries of this basin within their state provided that the requirements of Caddo Lake division of water be first met. Any projects constructed in the future for the storage or use of the Cypress Creek waters must contain adequate provisions to assure that the yield of Caddo Lake will be sufficient for navigation purposes and existing uses.

Paragraph 3

The yield of the water supply in Caddo Lake over and above the requirements of navigation and existing uses from the lake shall be apportioned on the basis of one-third to Texas and two-thirds to Louisiana. Louisiana agrees that these existing uses and the requirements of navigation should be enumerated and described in the final report.

Paragraph 4

If the storage capacity of Caddo Lake is enlarged, the additional amount of water developed would be divided one-third to Texas and two-thirds to Louisiana.

The amount of the enlargement of Caddo Lake will be based on its increase in storage volume.

Paragraph 5

At the time of this increase a determination shall be made of: (1) the uses of water in the basin, and (2) the increased amount of waters to be made available to the two states for allocation.

Reach 8
Comments by Louisiana on Cypress Creek Basin
(contd)

Paragraph 6

The provisions of the proposal by Louisiana deal with the tributaries of the Cypress Creek Basin which flow into Caddo Lake and separately with the tributaries which do not flow into Caddo Lake. We believe that these tributaries should be handled separately because of the existing use of the waters from the tributaries which do not flow into Caddo Lake.

MR. VANDERTULIP: If we get back to Reach No. 2 and have something developed along that line, we have a definition on what we mean by conservation storage, I think we can use the same thinking here.

MR. CRESAP: I think so, too. Is it your feeling that the major disagreement is the transbasin diversion?

MR. VANDERTULIP: We feel first of all that on Cypress Creek that we had given some priority on this proposal to Caddo Lake to maintain the conditions there. Then we have the navigation project come about when we're talking in terms of 100 cfs, as I recall, in addition to this first priority on Caddo. Then we suddenly find where we have a lot of water going out of the state and this is developed water. As such, we feel that we should be able to make whatever use of the remaining water in whichever way we see fit to use it.

MR. CRESAP: Let me say this. Since we have gone through so many * * * I can't just right now tell you, "yes, we will". But as far as I am concerned, I don't see anything different in this than * * * I believe that we will probably be willing to remove that restriction, but I would like a chance to confer with Watts.

MR. VANDERTULIP: If we do this, Dan, what I think we need to do instead of working on reaches of streams, we need to work out a provision covering release of water for allocated purposes, and draft that type of * * * as to what we should be doing, so we would have the free and unrestricted use of the provisions on making all of it subject to Caddo Lake. This release for downstream dedicated purposes. I think we could put that together pretty rapidly.

MR. CRESAP: Basically, that's all right with me.

MR. VANDERTULIP: What we need to do, looking at your proposal is to take care of the question of transbasin diversion. We may not need this item 1. * * *

GENERAL DAVIS: What do we want to do with Reach 8 here?

MR. VANDERTULIP: Well, you see. Dan suggests that I take this back and do a redraft, using these other provisions that we were putting in for Reach 5. We will send copies to everybody. In essence, we have agreed.

* * *

MR. VANDERTULIP: O.K. The transbasin diversion type language - the types of provisions that we agreed on Reach 5 will be drafted to take care of these releases from Federal projects downstream.

GENERAL DAVIS: Do I understand that now Texas is going to take this proposal and prepare a counter-proposal?

MR. VANDERTULIP: We have agreed in principle.

MR. CRESAP: And I will in the meantime check with my office to see that these are acceptable.

GENERAL DAVIS: As I gather, you agree in principle on the Louisiana proposal?

MR. VANDERTULIP: Yes * * * on the tributaries that didn't enter Caddo Lake in your Item 6.

MR. CRESAP: The main thing for that - is Cross Lake. That is Shreveport water supply.

* * *

GENERAL DAVIS: Can we hang a deadline on this?

MR. VANDERTULIP: We will have it in the mail by next week.

MR. CRESAP: Let's say we will have it by Roy Mathias' meeting.

GENERAL DAVIS: This would be a wording agreed to by both Texas and Louisiana? Any further discussion on Reach 8 then?

Reach 9, then. Interstate Tributaries, Arkansas and Louisiana.

MR. CRESAP: The major problem we had on this one was the fact that we were having trouble in defining a dam, and the definition of recorded flows and computed flows. In addition, Mr. Francis is having some studies made on the yields of the basins to the west and he is incorporating this portion of the Ouachita River in that study. So, basically, this is what we agreed to - after he gets some more information we can better describe what we mean by dams and low flows.

GENERAL DAVIS: Where is Remmel Dam?

MR. CLARK: Right close to Hot Springs, the last one downstream.

MR. VANDERTULIP: I think paragraph 4 will not be needed. Item 5 is the same thing. Item 5, of course, will remain under that general provision that any diversion would have to be the water allotted the state.

MR. FRANCIS: General provisions would apply on 4 and 5.

MR. _____: Now I wonder what has been done on this Reach No. 5 provisos in Federal dams might fit into some of this.

* * *

MR. FRANCIS: I had your letter of last week in which you sent to me the draft of the agreement between Louisiana and Arkansas and sent it to our attorney and asked him concerning the merits of the draft. He replied: "I feel that I do not have a sufficient knowledge of the facts involved in this matter to express an opinion of * * * I am sure that you know that I would be glad to give my opinion on the subject, if I felt qualified to express an opinion." Seriously, we, in general, agree to the release that Louisiana has put out, except for the information that we are hoping to receive in the very near future and we can be a little more definite in our comments, but until that time, I'll have to ask that you reserve decision.

GENERAL DAVIS: In regard to Reach 9. As I gather from what you say here, you will submit your state's comments on Reach 9 by a certain time.

MR. FRANCIS: Well, in order to expedite - we'll have our comments by the time the Red River Basin meets in Shreveport.

GENERAL DAVIS: You will mail that to us and to all the Commissioners?

MR. CLARK: Will this be a draft now in which your comments will be coordinated with Louisiana.

MR. FRANCIS: When we've reached an understanding as agreed between the two states, I have a question. What is a dam?

GENERAL DAVIS: I thought I knew.

MR. FRANCIS: That has been a point of discussion, considerable discussion, between Mr. Cresap and myself, because there are places in Arkansas where you can build a dam sill high * * * You can put in a low overflow type where the water from the entire runoff passes downstream. * * *

GENERAL DAVIS: You are really referring to a sill more than a dam. Actually, a sill chronically overtops.

MR. CLARK: Do you want to talk about dams or storage capacity?

MR. CRESAP: It may be that using the wording that we now have for Reach 5, we may be able to reword this thing some and won't need a definition of a dam. We did get some good ideas from this discussion today.

* * *

MR. FRANCIS: It is not misunderstanding at all. It is just hoping to arrive at a definition of those two words that would be acceptable, so someone might read it 25 years from now.

MR. OAKES: * * *

MR. CRESAP: Well actually, John, that is the thought. We assembled all the information available. It is very scattered and is not continuous. But his agency is making the study of the stream flows and when he has enought information to * * *

MR. VANDERTULIP: Basically, what you're saying is that on these listed bayous or rivers, any development that Arkansas makes would be done in such a manner that you will maintain certain minimum flows, and maybe that is just exactly what you want to say.

MR. CRESAP: Well, it is.

MR. VANDERTULIP: And if you have numbers that any developments that Arkansas may make subsequently - X, Y, and Z second feet at Bayous A, B, and C - would be met. What this says is that if Arkansas does make developments they are not held responsible for * * *

MR. FRANCIS: Well, true. Taking Bayou Bartholomew * * * time the water got within 6 inches of the top of the sill we would construct, it would come in another direction. So we would have diversion of water unintentionally. By the same token, there are areas which have zero recorded flood * * *

* * *

GENERAL DAVIS: Well, going back to recapping the reach here. Reach 9. Louisiana and Arkansas will submit to all of us a proposal agreed upon between the two of them by the 20th of April.

MR. FRANCIS: I will try to; I can't promise definitely.

GENERAL DAVIS: Then I would assume that the other members when they receive it will go over the thing and if they can buy that, they can so inform me. If not, why not. We can proceed on Reach 9 without waiting for the next meeting.

MR. FRANCIS: On Reach 9, the States of Arkansas and Louisiana have agreed generally to the distribution of water.

GENERAL DAVIS: Gentlemen, we have two more reaches - No. 1 and No. 3.

MR. JAMES: No. 3 is already agreed on.

(BREAK)

GENERAL DAVIS: Shall we turn to Reach 1? We have indicated an agreement by all states on Reach 1. Is that still the situation?

MR. JAMES: Provided that you strike out the last two lines. In par 2, after "Red River" strike the last two lines.

GENERAL DAVIS: Again that is one of the overall provisions.

MR. VANDERTULIP: No, sir.

MR. CLARK: The authorization of the Denison project provides for any depletion upstream.

GENERAL DAVIS: Is the deletion agreed to by all the states?

MR. FRANCIS: Would you repeat that, sir, I missed it?

GENERAL DAVIS: The proposal is to delete the last two lines on page 1. The sentence would end with "Red River" and the last two lines would be deleted.

MR. CRESAP: I withdraw my flag and cover it in comments.

MR. JAMES: Do not strike his (La.) comments.

GENERAL DAVIS: I think the footnote there would read that all states, with the exception of Louisiana, favored the deletion of those last two lines. Louisiana would like to have the two lines remain.

MR. VANDERTULIP: Well, I can understand that Louisiana wants them to remain. But we have been talking about general provisions that would not change any Congressional authorization, but this one would. This proviso would change an existing Congressional authorization.

MR. CLARK: This is the item that the Department of Justice pointed out. That the authorization would be changed by such a provision.

* * *

MR. JAMES: You would have more water than you know what to do with any way. * * *

MR. VANDERTULIP: Let us suggest that as far as the minutes of this present meeting, let's have it deleted from the actual language and show it in the comments.

GENERAL DAVIS: All right, we are all agreed. Now - Reach No. 3. All agreed without any qualifications as of last time. Does that still stand?

MR. JAMES: No comment.

MR. VANDERTULIP: We are all agreed. We understand that if a state desires to make transbasin diversion, that the language covers this possibility.

GENERAL DAVIS: Reach No. 4. Lake Texoma. We were agreed with the exception of the last paragraph which the three states, other than Louisiana, wish to delete and which Louisiana wishes retained. We can delete it from the language and indicate the views of Louisiana. I think, gentlemen, this completes all of the reaches. In reviewing Reach No. 2, Oklahoma believes that they can come up with their studies, based on those being performed by Mr. Bliss, around June. Is that correct?

MR. JAMES: Three or four months from now. That's the indication he gave us when we talked to him in January.

* * *

GENERAL DAVIS: It is my understanding that as a part of their exercise Oklahoma would specifically comment on the proposal submitted by Texas for Reach 2.

MR. MCKINNEY: Comments on our joint proposal and our findings. It is really not a proposal.

GENERAL DAVIS: It would appear to me that we shouldn't have another meeting until Oklahoma has completed these studies and Oklahoma and Texas have had an opportunity to sit down by themselves and hammer out the proposal for the consideration by the rest of the Commission.

MR. MCKINNEY: We will try to do that. You are not going to set a meeting until, I presume, we have reached some conclusion.

GENERAL DAVIS: I don't think it would be profitable to do so. I think the main thing is to hold our feet to the fire for the two states, and particularly Oklahoma, to make a study and the two states to get together. So I would say right now that the ball rests with Oklahoma as to when we can meet next.

MR. JAMES: General, we will expedite that as much as we can and let you know our progress so the date of the next meeting can be arrived at.

GENERAL DAVIS: The monkey is on your back, Mr. James, for our next meeting.

MR. JAMES: I appreciate that.

* * *

GENERAL DAVIS: Is there any other action we can take in the interim - not by any meeting - to advance the compact?

MR. NELSON: The legal people ought to be getting hold of this thing.

MR. CLARK: I was wondering if after we have the new information that Arkansas and Louisiana are going to work up together and send in, we will have pretty much agreements, subject to comments, on all the reaches except No. 2. We could send the data to the Legal Committee.

* * *

MR. NELSON: It seems to me that the Legal Committee should look at it. * * *

MR. VANDERTULIP: (Presented a paper "Suggested Action Program".)

Suggested "Action Program"

At a previous meeting, mention was made of an "Action Program" to function after the Compact is consummated. I would like to elaborate briefly upon what such a Committee might be able to accomplish.

Any Compact Commission that serves after a compact is ratified has certain duties. These can be passive and transact in one annual meeting all of the business for the year, or the Commission can staff a large technical organization and carry out many functions. Somewhere between these two boundaries should lie an ideal area for building an effective but workable administrative organization.

Let me use as an example the Pecos River Compact Commission. There is a duly appointed Commission, appointed by the Governors of the states of New Mexico and Texas and a chairman representing the United States. For the purpose of carrying on the day-by-day business the Commission maintains an office in Carlsbad, staffed by a Secretary-Manager and a secretary. Meetings are called periodically, in which the Secretary-Manager makes his report and receives instructions for proceeding with new or continuing problems. The relatively small amount of technical work is done by staff personnel of the member States, Federal agencies, or by contract with consultants who are specialists within the field. A similar arrangement has been developed by the Upper Colorado River Commission with the states of Colorado, Utah, New Mexico and Wyoming.

The term "Action Program" is to a degree coined from some of the undertakings of the Commission. For example, the Pecos River basin is over-run with salt cedars and other phreatophytes. Rather than sit idly by, or attempt an impossible local program of eradication, the Pecos River Compact Commission was active through its Secretary-Manager in participating in joint State and Federal agency studies and in sponsoring legislation in Washington to author-
(a line was omitted here)
594 was signed on September 12, 1964.

Sponsoring a bill through Congress may sound like simple lobbying, but the role of the Commission did not end there. To make a program of eradication possible the river must be kept operable during the drying-out and brush cutting operations. Negotiations must be entered into with the water users who may gain or lose benefits during the processes.

A second activity carried out by the Pecos River "Action Program" has been its work on HJR 290, authorizing the Secretary of Interior to carry out a continuing program to reduce nonbeneficial consumptive use of water in the Pecos River Basin, New Mexico. Again, the actual work will be done by an outside organization but under the directive of the Pecos River Compact Commission.

Another activity sponsored by the Pecos River Commission was the Malaga Bend salinity alleviation project. Here, the state of New Mexico furnished $290,000 for the purpose of buying [illegible]ements and rights-of-way for channelization and spur drains from Artesia, New Mexico to McMillian reservoir. A bill was guided through the Congress authorizing $2,500,000 for construction of canals and drains. Pumping of brines perched almost eleven (11) feet above the bed of the Malaga Bend section of the river are stored in a detention reservoir for evaporation. Construction started in 1962. It is estimated that this alleviation project prevents 379 tons of salt per day from entering the Red Bluff reservoir and irrigation project located downstream from McMillian lake. Not only is the quality of water in Red Bluff reservoir improving, but a firm offer has been received to pay 50¢ per ton for the first 10,000 tons and 25¢ per each additional ton of salt recovered from the disposal basin at Malaga.

I can see many similar or parallel functions to be performed by an "Action Program" under the Red River Compact. Here, we have a salt cedar problem, flood control, a salt water problem industrial wastes; we have recreational interests, navigation interests, agricultural and industrial interests. There may well be a time when each of these areas of interest will demand special attention from the Red River Compact Commission. This seems to be an opportune time to start providing the type of organization to squarely meet the problems.

GENERAL DAVIS: This, of course, is a program of action following the signing of the Compact.

MR. VANDERTULIP: Yes, the contract itself would have to provide in the general provisions, the duties and functions of the Compact Commission itself. They carry out a program of action to alleviate saline water conditions and do this and this and this. It leaves it to them what kind of a program they carry on, but it does make it a matter of jurisdiction for them, that they can carry out this program.

GENERAL DAVIS: This is included in the contract itself.

MR. VANDERTULIP: Reading from the Pecos River Compact will give you some idea of this: "New Mexico and Texas shall cooperate and support legislation for the authorization and construction of projects * * for the beneficial * * . New Mexico and Texas shall cooperate with agencies of the United States to devise and effectuate means of alleviating the salinity of reaches of the Pecos River." The same thing on water quality on the Red. Those are the types of language that I had in mind. * * would cooperate to do these things.

GENERAL DAVIS: Well, are we in a position to initiate other meetings on something like that? Put separate members of the Commission on the drafting of this action program.

MR. VANDERTULIP: I think this in the form of a "flag".

GENERAL DAVIS: My point is - I think if we can, we should. We probably need a critical path analysis of our operations, or we may wind up with verbiage on all of our reaches being through -- then all of a sudden realize that there are other paralleling things that we should have been doing and didn't accomplish.

MR. VANDERTULIP: As far as the general language - some time back I drafted some provisions and action program. I can dig that up and circulate it.

MR. NELSON: General, I think that would be part of the administrative procedures - this Compact Commission will be created if the states approve this document.

* * *

GENERAL DAVIS: You say you have a draft somewhere, John?

MR. VANDERTULIP: Yes, I don't have it with me.

GENERAL DAVIS: Would you submit that to me, John, and then we can reproduce it and submit it to the other members of the Commission, and see if we can develop - by separate action - a further draft of such a program?

RECEIVED
OCT 16 1970
TEXAS WATER RIGHTS COMMISSION
AUSTIN, TEXAS

MINUTES OF THE 42D MEETING
RED RIVER COMPACT COMMISSION
DALLAS, TEXAS
19 NOVEMBER 1969

The 42d Meeting of the Red River Compact Commission was convened by the Chairman, Major General Rollins, at 9 a.m., 19 November 1969, in the Baker Hotel, Dallas, Texas. An attendance list is attached.

General Rollins introduced himself as the new Federal representative, replacing General MacDonnell who has retired. He also introduced Mr. W. R. Bryant, who was appointed to succeed Mr. Leighton McKinney, deceased, subsequent to the 41st Meeting. Each Commissioner introduced the other representatives from his State, and the representatives of the Federal agencies were recognized.

The Minutes of the 41st Meeting were approved as drafted, with the exception of the following revision which was suggested by the State of Louisiana: The last sentence in the first paragraph on page 3 which read, "It was agreed that each member of the Engineering Advisory Committee should prepare in as complete form as practicable the data for his respective State and furnish the data to his Commissioner," was revised to read, "It was agreed that each member of the Engineering Advisory Committee should prepare, in as complete a form as practicable, all data pertinent to the reaches with which it is concerned and furnish this data for incorporation into the Engineering Report."

Mr. Forrest Nelson, Chairman, reported for the Engineering Advisory Committee. Following the adoption of the Compact draft for review by the States and Federal agencies in February of 1966, the Compact Commission requested the Engineering Committee to prepare an Engineering Report to include basic data on drainage areas, rainfall, runoff, streamflow, and storage, along with conclusions and recommendations regarding the distribution of the streamflow between States. For Compact purposes, the Red River Basin has been divided into five reaches because of the difference in hydrologic characteristics, such as rainfall and storage. The Engineering Committee is preparing a separate volume on each of the five reaches. The reports for Reaches I and II are essentially complete, with the exception of the conclusions and recommendations on Reach II. Mr. Nelson presented a summary of this information, using slides to illustrate locations and patterns of rainfall and runoff. At the conclusion of the presentation, the Engineering Committee was commended for its accomplishment to date using personnel who have heavy commitments without these additional duties. The Commission agreed that it would take no formal action on the Engineering Report until all five volumes are complete. Mr. Nelson estimates that this will probably be some time in the fall of 1970.

Following Mr. Nelson's presentation, representatives from other States were invited to make comment. Mr. Luscombe stated that some additional points needed to be covered. He felt that the Compact should state that any water imported from outside of the Red River

Basin should be the property of the State responsible for importation and should not be subject to distribution under the Compact. Mr. Cresap pointed out that the concern in the lower part of the basin was different from that in the more arid areas to the west. Since the downstream States have very little storage potential, they are concerned with the daily flows; while, the upstream areas are satisfied to handle streamflow on an annual basis. He requested some assurance in the Compact that low flows would be maintained. He recognized, however, that minimum historical flows cannot be guaranteed, since more severe draughts may be experienced in the future. Mr. Nelson stated that upstream States had no intention of diverting water from streams during low-flow periods, but did not envision releases from storage to maintain minimum flows. Mr. Watts suggested that the water required to operate the Red River Navigation Project, which was authorized by the 1968 River and Harbor Act, should be established in the Compact without charge to the States involved. General Rollins agreed to furnish information on the quantities involved to the Engineering Committee.

Mr. Cresap said that he feels the Engineering Committee needs to know what flows would have been available to the States for distribution during draught years such as 1944, 1956, 1963, and 1964 under the proposed terms of the Red River Compact for Reach II. Some of the assumptions suggested for consideration in these routings are: no flow from intrastate tributaries into the main stream of the Red River, Millwood and Texarkana Reservoirs in operation in accordance with approved procedures, that only

that flow above the minimum historical flow is available for distribution, and that 60% of the water originating in any reach is available for use. The routing should be made on a daily basis or as an absolute minimum on a weekly basis. The Texas Water Rights Commission has a contract with Brown and Root at the present time to develop hydrologic data on the Red River Basin. Mr. Keith suggested that the information already available from this study be investigated before any new studies are undertaken In view of the fact that this study is already underway, the Commission agreed to ask the Texas Water Rights Commission, through its chairman, Judge Dent, to develop the routings proposed by Mr. Cresap, making full use of any available information. Mr. Watts indicated that Louisiana may be able to help pay part of the cost. The Corps of Engineers agreed to furnish any additional information needed on operating procedures for the reservoirs that are involved for input to this study. The Mississippi River Commission staff was assigned the task of preparing the request to the Texas Water Rights Commission. A draft will be discussed with representatives from Louisiana and Texas before the final letter is mailed.

Mr. Watts announced that he would retire on 1 April 1970 as the Assistant Director of the Louisiana Department of Public Works and will become the Executive Vice President of the Red River Valley Association. In that capacity, he will not be able to represent the State of Louisiana; therefore, this is the last meeting he will attend as a Commissioner. Mr. Watts is the only member of the current Commission who was a member of the original Commission established in 1956. The Commission commended

Mr. Watts for his outstanding accomplishments during this period and expressed its appreciation for the service he has rendered.

Mr. Belanger stated that the Legal Advisory Committee was awaiting an agreement on distribution of flows before attempting to revise the draft of the Red River Compact.

General Rollins reminded the Commissioners that the questions on water quality submitted to the Federal Water Pollution Control Administration in 1967 have never been answered. He stated that he had recently advised the Regional Director of the FWPCA that answers to these questions were still needed. Mr. John Smouse, Deputy Regional Director, stated that a draft set of answers to these questions was presently under consideration in their Washington Office and that he anticipated a reply in the near future.

A date and location for the next Compact Commission meeting was discussed. It was agreed that Dallas was probably the most satisfactory location. The date will depend on the action by the FWPCA on the pollution questions and will be set after receipt of the answers.

The meeting was adjourned at 11:45 a.m.

1 Incl
Attendance List

42D MEETING
RED RIVER COMPACT COMMISSION
DALLAS, TEXAS
19 NOVEMBER 1969

ATTENDANCE LIST

Members of Compact Commission

MG A. P. Rollins, Jr.	Federal Representative and Chairman, Corps of Engineers, USA	Vicksburg, Miss.
W. R. Bryant	Commissioner	Sherman, Texas
S. K. Jackson	Commissioner	Little Rock, Ark.
G. N. Keith	Commissioner	Oklahoma City, Okla.
C. T. Watts	Commissioner	Baton Rouge, La.

Members of Engineering Advisory Committee

Richard Bennett	Louisiana Dept. of Public Works	Baton Rouge, La.
D. V. Cresap	Louisiana Dept. of Public Works	Baton Rouge, La.
Allen Haws	Oklahoma Water Resources Bd.	Oklahoma City, Okla.
James A. Luscombe	Texas Water Rights Commission	Austin, Texas
Forrest Nelson	Oklahoma Water Resources Bd.	Oklahoma City, Okla.
Fred Simpson	Oklahoma Water Resources Bd.	Oklahoma City, Okla.
Ivan Stout	Texas Water Development Bd.	Austin, Texas

Members of Legal Advisory Committee

Homer Belanger	Louisiana Dept. of Public Works	Baton Rouge, La.
John F. Gibson, Jr.	Ark. Soil & Water Conservation Commission	Little Rock, Ark.
Dewayne Lobaugh	Assistant Attorney General	Oklahoma City, Okla.
Vince Taylor	Assistant Attorney General	Austin, Texas

Others Present

Fred H. Bayley III	Corps of Engineers, LMVD	Vicksburg, Miss.
E. P. Blankenship	Corps of Engineers, LMVD	Vicksburg, Miss.
John Collins	Mgr., Altus Irrigation District	Altus, Okla.
Norman Flaigg	Bureau of Reclamation	Oklahoma City, Okla.
Robert Harbinson	Attorney, Altus Irrigation Dist.	Altus, Okla.
Leonard Hough	Corps of Engineers, SWD	Dallas, Texas
Charles Northington	Bureau of Water Hygiene	Dallas, Texas
John T. Pegg	Corps of Engineers, LMVD	Vicksburg, Miss.
John Smouse	FWPCA	

Inclosure 1

MINUTES OF THE 43D MEETING
RED RIVER COMPACT COMMISSION
DALLAS, TEXAS
25 SEPTEMBER 1970

The 43d Meeting of the Red River Compact Commission was convened by the Chairman, Major General Rollins, at 9:45 a.m., in the Adolphus Hotel, Dallas, Texas. An attendance list is attached.

General Rollins welcomed Mr. Ralph Elliott, of Texas, and Mr. Dan Cresap, of Louisiana, as new members of the Commission. Each Commissioner introduced the other representatives from his State, and the representatives of Federal agencies were recognized.

Next, the Minutes of the 42d Meeting of the Commission were approved as drafted.

Mr. Forrest Nelson, Chairman of the Engineering Advisory Committee, presented a summary of the committee report to the Commission, dated June 1970, using slides to illustrate the information contained in the report. Pertinent data assembled include such items as topography, climatology, streamflow, developed and potential water resource projects, and allocated water use. At the conclusion of the presentation, the Commission officially received the report and commended the Engineering Advisory Committee for an outstanding job.

Mr. Nelson also gave a status report on progress toward recommendations to the Commission on the division of water in the five reaches.

(1) Reach I. Oklahoma and Texas have agreed on the division of water in this reach with the exception of the North Fork. The Lugert-Altus

Irrigation District will not ba able to function as designed, if the split agreed to for the remainder of the reach is applied to the North Fork. Texas and Oklahoma are considering entering into a friendly suit to obtain a declaratory judgment on apportionment of water on the North Fork. If the findings are favorable to Oklahoma, the reductions in the release to Texas on the North Fork could be made up from other streams in Reach I. If the findings are unfavorable for Oklahoma, they will probably request financial relief from Federal repayment that is required. Texas may consider joining in this request. This entire matter of a declaratory judgment is in the exploratory stage. The Engineering Advisory Committee was requested to determine the amount of water that Texas should receive as compensation if the Lugert-Altus Irrigation District retains the flows they need on the North Fork.

(2) Reach II. The Texas Water Development Board furnished the Engineering Committee some preliminary routings of flows that would have been available in Reach II in critical low-flow years under the terms of the Comapct. If the methodology used in the routing is satisfactory, Mr. Seward will make additional routings. The purpose of these routings is to provide background information for the committee to enable them to agree on a recommended division of water. Louisiana indicated 1 month will be needed to review the methodology and Mr. Seward estimates that 3 months will be needed to complete additional routings.

(3) Reach III. Louisiana and Texas repesentatives will now begin work on a recommended division of water in this reach. The main concern is the

rights to water in Caddo Lake, which is on the boundary between the two States.

(4) Reach IV. The representative of Arkansas and Louisiana will resume the discussion on the appropriate release of water from Reach IV to Reach V.

(5) Reach V. This reach is entirely in the State of Louisiana; therefore, no division is required.

In the fall of 1967, The Chairman of the Red River Compact Commission furnished the Federal Water Pollution Control Administration a list of questions on water quality submitted by each of the four Commissioners. Answers were needed to these questions before significant progress could be made on the Compact. The questions have not been answered to date and approval of answers is now in the hands of the Solicitor of the Department of Interior. Mr. Vanderhoof, the Regional Director of the Federal Water Quality Administration (previously the Federal Water Pollution Control Administration) suggested that each State prepare views on how the questions should be answered, and that these views be furnished to the Solicitor's office to provide a better understanding of the position of the States, and to expedite the provision of answers. The Commissioners agreed to furnish views on response to a formal request. (After the close of the meeting, Mr. Vanderhoof furnished the attached letter suggesting this course of action.) General Rollins will forward this request on to the other Commissioners. It was agreed that the States will probably need about 2 months to complete the views and furnish them to the Chairman. Based on this schedule, the views of all four States will be submitted to the Regional Director of FWQA by 1 January 1971. The Chairman will invite the Solicitor, through Mr. Vanderhoof,

to discuss preliminary findings with the Compact Commission before issuing final answers.

Mr. Cresap announced that he would no longer serve on the Engineering Advisory Committee and that his assistant, Mr. Arthur Theis, would join Mr. Richard Bennett to represent Louisiana on the committee. In Arkansas, Mr. G. J. Stramel has rejoined the Arkansas Soil and Water Conservation Commission and will resume his duties with the Engineering Advisory Committee relieving Mr. Jackson.

General Rollins asked for an expression from the Commissioners on the progress and the present need for a Compact. All of the Commissioners stated that a Compact was still needed and in general felt that conflicts were closer to resolution. Mr. Cresap stated that each reach is different and will probably require a different basis for apportionment. Mr. Jackson feels this is particularly true of the more water abundant Reaches IV and V.

The Commission agreed that Dallas is the most convenient location for the Compact meetings. The next meeting will be held in the spring when answers to the water quality questions are ready, unless the Engineering Advisory Committee is ready to make recommendations prior to that time.

1 Incl

Attendance List

43D MEETING
RED RIVER COMPACT COMMISSION
DALLAS, TEXAS
25 SEPTEMBER 1970

ATTENDANCE LIST

Members of Compact Commission

MG A. P. Rollins, Jr.	Federal Representative and Chairman, Corps of Engineers, USA	Vicksburg, Miss.
D. V. Cresap	Commissioner	Baton Rouge, La.
Ralph Elliott	Commissioner	Sherman, Texas
S. Keith Jackson	Commissioner	Little Rock, Ark.
Guy Keith	Commissioner	Oklahoma City, Okla.

Members of Engineering Advisory Committee

Richard Bennett	Louisiana Dept. of Public Works	Baton, Rouge, La.
Alan Haws	Oklahoma Water Resources Bd.	Oklahoma City, Okla.
James A. Luscombe	Texas Water Rights Commission	Austin, Texas
Forrest Nelson	Oklahoma Water Resources Bd.	Oklahoma City, Okla.
Fred Simpson	Oklahoma Water Resources Bd.	Oklahoma City, Okla.
Ivan Stout	Texas Water Development Bd.	Austin, Texas
A. P. Theis	Louisiana Dept. of Public Works	Baton Rouge, La.

Members of Legal Advisory Committee

John F. Gibson, Jr.	Ark. Soil & Water Conservation Commission	Little Rock, Ark.

Others Present

H. F. Ball	Dept. Housing & Urban Dev.	Dallas, Texas
Fred H. Bayley III	Corps of Engineers, LMVD	Vicksburg, Miss.
E. P. Blankenship	Corps of Engineers, LMVD	Vicksburg, Miss.
R. L. Buffington	Corps of Engineers, SWD	Dallas, Texas
John Collins	Mgr., Altus Irrigation District	Altus, Okla.
Bruce Cox	Corps of Engineers	Tulsa, Okla.
Robert B. Harbison	Attorney, Altus Irrigation Dist.	Altus, Okla.
Leonard Hough	Corps of Engineers, SWD	Dallas, Texas
Klyde Z. Huston	FWQA	Dallas, Texas
W. J. Ivester	City of Altus, Okla.	Altus, Okla.
John Pegg	Corps of Engineers, LMVD	Vicksburg, Miss.
Lewis B. Seward	Texas WDB	Austin, Texas
R. A. Vanderhoof	Regional Director, FWQA	Dallas, Texas
Calvin Watts	Executive Vice President	Red River Valley As:
Byron T. Waldrip	USDA-SCS	Little Rock, Ark.

Inclosure 1

Approved at 45th Meeting
Dallas, Texas
15 September 1972

MINUTES OF THE 44th MEETING
RED RIVER COMPACT COMMISSION
DALLAS, TEXAS
16 FEBRUARY 1972

The 44th Meeting of the Red River Compact Commission was convened at 9 a.m., 16 February 1972, in the Windsor Room of the Adolphus Hotel, Dallas, Texas. An attendance list is attached (Inclosure 1). General Noble welcomed the group as the new Federal Chairman. Each Commissioner introduced the other representatives from his State. Representatives of Federal agencies were also recognized.

The Minutes of the 43d Meeting were approved after the last sentence beginning on page 1, which read, "The Lugert-Altus Irrigation District will not be able to function as designed, if the split agreed to for the remainder of the reach is applied to the North Fork," was changed to read, "It is the contention of Oklahoma that the Lugert-Altus Irrigation District will not be able to function as designed, if the split agreed to for the remainder of the reach is applied to the North Fork."

As the Chairman of the Engineering Advisory Committee, Mr. Forrest Nelson, of Oklahoma, reviewed the climatological and hydrological data for the Red River Basin. Following this review, he submitted the recommendations of the Engineering Advisory Committee on the division of water for Reaches I and II (Inclosure 2). Mr. Keith moved and Mr. Cresap seconded his motion that the Compact Commission receive the Engineering Advisory Committee's report on Reach I. The Commissioners agreed to review the Reach I recommendations, and to furnish comments to the other Commissioners prior to the next meeting. Mr. Elliott moved and Mr. Keith seconded his motion that the Commission receive the Engineering Advisory Committee's report on Reach II. Additional

information is needed, particularly by the Louisiana Commissioner, before action is taken on this reach. Mr. Cresap and Mr. Keith agreed to furnish a list of items of information needed to the Chairman of the Engineering Committee as soon as possible. The Texas Water Development Board will probably make any additional computer runs that are made. Mr. Stout indicated that about 90 days would be required to complete additional computer runs, and requested that all members of the Engineering Advisory Committee be present during the computer operation in case any interpretation of the data is needed. The Compact Commission requested the Engineering Advisory Committee to furnish the additional information prior to the next meeting, if possible.

After discussion of the water quality questions, the Commissioners agreed that the Compact should not attempt to apportion water quality releases. General Noble agreed to request a statement from the Environmental Protection Agency to cover any Federal interest in water quality that should be protected by the Compact for the Red River.

General Noble presented a proposed schedule (Inclosure 3) for completion of the Red River Compact. The other Commissioners approved the general concept, and agreed to adhere to the schedule as closely as possible.

The Commissioners agreed that the next meeting should be held in Dallas in June 1972.

Meeting adjourned.

3 Incls
As stated

44th MEETING
RED RIVER COMPACT COMMISSION
DALLAS, TEXAS
16 FEBRUARY 1972

ATTENDANCE LIST

Members of Compact Commission

MG C. C. Noble	Federal Representative and Chairman, Corps of Engineers, USA	Vicksburg, Miss.
Daniel V. Cresap	Commissioner	Baton Rouge, La.
Ralph Elliott	Commissioner	Sherman, Texas
S. Keith Jackson	Commissioner	Little Rock, Ark.
Guy N. Keith	Commissioner	Oklahoma City, Okla.

Members of Engineering Advisory Committee

Richard L. Bennett	Louisiana Dept. of Public Works	Alexandria, La.
Alan Haws	Oklahoma Water Resources Board	Oklahoma City, Okla.
James A. Luscombe	Texas Water Rights Commission	Austin, Texas
Duane Motsenbocker	Oklahoma Water Resources Board	Oklahoma City, Okla.
Forrest Nelson	Oklahoma Water Resources Board	Oklahoma City, Okla.
Ivan M. Stout	Texas Water Development Board	Austin, Texas
G. J. Stramel	Ark. Soil & Water Conserv. Comm.	Little Rock, Ark.
A. P. Theis	Louisiana Dept. of Public Works	Baton Rouge, La.

Members of Legal Advisory Committee

Homer J. Belanger	Louisiana Dept. of Public Works	Baton Rouge, La.
Robert H. Mitchell	Assistant Attorney General	Oklahoma City, Okla.
Vince Taylor	Assistant Attorney General	Austin, Texas

Others Present

Fred H. Bayley III	Corps of Engineers, LMVD	Vicksburg, Miss.
John Collins	Lugert-Altus Irrigation Dist.	Altus, Okla.
R. Terry Coomes	Corps of Engineers, SWD	Dallas, Texas
Randall M. Fuller	NWS, Dept. of Commerce	Fort Worth, Texas
Robert B. Harbison	Lugert-Altus Irrigation Dist.	Altus, Okla.
John McCallister	Field Rep., Dept. of Commerce	Fort Worth, Texas
John T. Pegg	Corps of Engineers, LMVD	Vicksburg, Miss.
Larry M. Weber	Lugert-Altus Irrigation Dist.	Altus, Okla.

Inclosure 1 to Encl 1

RED RIVER REACH I

Revised at 16 Feb 72 meeting.

RECOMMENDATIONS

A number of different methods for the apportionment of the waters of the Red River Basin Reach I have been considered by the Engineering Advisory Committee. The "Drainage Area Method" is not feasible for Reach I as large areas in this reach are covered by shallow depressions having no outlets and thus do not contribute substantial surface flow to the Red River. Differentiation of contributing and noncontributing drainage areas would be extremely difficult.

The "Conservation Storage Method" was also considered. Reservoir sites suitable for storage were found to be very near the state line and would thus entail multitudinous problems in the administration of a compact. This method is not considered applicable to conditions in Reach I.

The "Percentage of Flow Method" was studied by the Engineering Advisory Committee and is considered applicable to Reach I. The Committee therefore makes the following specific recommendations:

A. For purposes of apportionment of the waters of Red River Basin, Reach I, the following subbasins be established:

1. Interstate Streams-Texas

Interstate Streams-Texas shall consist of all those streams and tributaries originating in Texas and crossing the Texas-Oklahoma state line into Oklahoma. These streams are:

Prairie Dog Town Fork of Red River Buck Creek

Incl 2 to Incl.

Lebos Creek	Salt Fork of Red River
Elm Fork	North Fork of Red River
Sweetwater Creek	Washita River

2. Interstate Streams-Oklahoma

Interstate Streams-Oklahoma shall consist of all those streams and tributaries with headwaters in Texas and their tributaries from the Texas-Oklahoma state line to the Red River and Lake Texoma. These streams are:

Buck Creek	Lebos Creek
Salt Fork of Red River	North Fork of Red River
Washita River	

3. Intrastate Streams-Texas

Intrastate Streams-Texas shall consist of all those streams and tributaries wholly in Texas and flowing into Red River or Lake Texoma on the Texas side of the main stem below the Texas-Oklahoma state line. These streams are:

Groesbeck Creek	Wanderers Creek
Pease River	China Creek
Wichita River	Little Wichita River
Belknap Creek	Farmers Creek
Mountain Creek	Fish Creek
Beaver Creek	

4. Intrastate Streams-Oklahoma

Intrastate Streams-Oklahoma shall consist of all streams and tributaries wholly in Oklahoma and flowing into the Red River and Lake Texoma on the Oklahoma side of the main stem below the Texas-Oklahoma state line. These streams are:

Cache Creek
Mud Creek
Beaver Creek
Walnut Bayou
Hickory Creek

5. Red River Main Stem

Red River Main Stem shall consist of all those intervening areas on both sides of the river from the Texas-Oklahoma state line to Denison Dam not specifically delineated in the four subbasins above and including Lake Texoma.

B. The "Percentage of Flow Method" be used as a means of apportioning the waters of the Red River, Reach I, between the State of Texas and the State of Oklahoma in the following manner:

1. The State of Texas shall have free and unrestricted use of the waters of all Interstate Streams-Texas subject to the limitations that Texas shall allow an amount of water equivalent to 40 percent of the total annual runoff originating from each stream in Texas to flow into Oklahoma.

2. The State of Oklahoma shall have free and unrestricted use of the waters of all Interstate Streams-Oklahoma subject to the limitations that Oklahoma shall allow an amount of water equivalent to 40 percent of the total annual runoff originating from each Interstate Stream-Oklahoma within the State to flow into the Red River

Main Stem.

3. The State of Texas shall have free and unrestricted use of the waters of all Intrastate Streams-Texas.

4. The State of Oklahoma shall have free and unrestricted use of the waters of all Intrastate Streams-Oklahoma.

5. The State of Texas and the State of Oklahoma shall have free and unrestricted use of all the waters of Red River Main Stem subject to the following limitations:

   The water shall be divided between the two states in that proportion that each state contributes to the flow of the stream.

C. The administrative body established by this Compact adopt rules and regulations and methods of procedure for:

   1. Obtaining streamflow records and precipitation and evaporation records for the proper implementation of this Compact.

   2. Accounting of runoff from each stream and balancing of accrued credits or debits on runoff from each stream on a water-year basis, shall be made by March 1 of the following year.

RED RIVER REACH II

RECOMMENDATIONS

A number of different methods for apportioning the waters of Red River Basin Reach II have been considered by the Engineering Advisory Committee. The "Drainage Area Method" is not believed to be feasible for Reach II as there is considerable variance in rainfall and runoff throughout this area.

The "Conservation Storage Method" is not believed to be feasible for Reach II because of the limited number of sites available for construction of reservoirs.

The "Percentage of Flow Method" was studied by the Engineering Advisory Committee and is considered feasible in a modified form for Reach II.

The Committee therefore makes the following specific recommendations:

A. For purposes of apportioning the waters of Red River Basin Reach II, sub-basins be established as follows:

1. Intrastate Streams-Oklahoma

   The Intrastate Streams-Oklahoma sub-basin shall consist of those streams and their tributaries above existing, authorized or proposed last downstream major dam sites, wholly in Oklahoma and flowing into Red River below

Denison Dam and above the Oklahoma-Arkansas stateline. These streams and their tributaries with existing, authorized or proposed last downstream major dam sites are as follows:

Stream	Site	Location Stream Mile
Island-Bayou	Albany	6.5
Blue River	Durant	13.0
Boggy River	Boswell	18.9
Kiamichi River	Hugo	17.6

2. Intrastate Streams-Texas --

The Intrastate Streams-Texas sub-basin shall consist of those streams and their tributaries above existing, authorized or proposed last downstream major dam sites, wholly in Texas and flowing into Red River below Denison Dam and above the Texas-Arkansas stateline. These streams and their tributaries with existing, authorized or proposed last downstream major dam sites are as follows:

Stream	Site	Location Stream Mile
Shawnee Creek	Randall	2.0
Brushy Creek	Valley	5.0
Bois d' Arc Creek	Bonham	35.0

(continued)

Stream	Site	Location Stream Mile
(Timber Creek	Timber Creek	2.0)
(Coffee Mill Creek	Coffee Mill	0.5)
(Sandy Creek	Crockett	2.0)
Sanders Creek	Pat Mayes	4.6
Pine Creek	Crook	21.0
Big Pine Creek	Big Pine	13.2
Pecan Bayou	Pecan Bayou	15.0
Mud Creek	Liberty Hill	8.0
Barkman Creek	Barkman	10.0

3. Interstate Streams-Oklahoma and Arkansas --

The Interstate Streams-Oklahoma and Arkansas sub-basin shall consist of those streams and their tributaries above existing, authorized or proposed major dam sites, originating in Oklahoma or Arkansas and crossing the Oklahoma-Arkansas stateline one or more times before flowing into the Red River in Arkansas. These streams and their tributaries with existing, authorized or proposed last downstream major dam sites are as follows:

In Oklahoma

Stream	Site	Location Stream Mile
Little River	Pine Creek	145.3
Glover Creek	Lukfata	17.3
Mountain Fork River	Broken Bow	20.3

In Arkansas -

Stream	Site	Location Stream Mile
Little River	Millwood	16.0

4. Interstate Streams-Texas and Arkansas --

The Interstate Streams-Texas and Arkansas sub-basin shall consist of those streams and their tributaries above existing, authorized or proposed major dam sites, originating in Texas and crossing the Texas-Arkansas stateline before flowing into the Red River in Arkansas. These streams and their tributaries with existing, authorized or proposed last downstream major dam sites are as follows:

Stream	Site	Location Stream Mile
McKinney Bayou		
(Clear Fork Creek	Waterworks	1.5)
Sulphur River	Texarkana	45.0

5. Mainstem-Red River --

The Mainstem-Red River sub-basin shall consist of all those streams and their tributaries flowing into Red River below Denison Dam and above the Arkansas-Louisiana stateline not specifically included in the other four sub-basins of Reach II.

B. For purposes of apportioning the waters of Red River Reach II, the "Percentage of Flow Method" be used to divide the flows of the five sub-basins established by Par. A. as follows:

1. Intrastate Streams-Oklahoma --

The State of Oklahoma shall have free and unrestricted use of the waters of this sub-basin as designated by Par. A. 1., provided that Oklahoma may use the beds and banks downstream of this sub-basin, including the mainstem of Red River, for the purpose of conveying water originating in this sub-basin to designated downstream diversions.

2. Intrastate Streams-Texas --

The State of Texas shall have free and unrestricted use of the waters of this sub-basin as designated by Par. A. 2., provided that Texas may use the beds and banks downstream of this sub-basin, including the mainstem of Red River, for the purpose of conveying water originating in this sub-basin to designated downstream diversions.

3. Interstate Streams-Oklahoma and Arkansas --

The States of Oklahoma and Arkansas shall each have free and unrestricted use of the waters of this sub-

basin as designated in Par. A. 3., subject to the limitation that Oklahoma and Arkansas shall allow a quantity of water equal to 40 percent of the total weekly runoff originating below the last downstream major dam sites in their respective states to flow into the downstream state. Where there are no designated last downstream dam sites the upstream state shall allow a quantity of water equal to 40 percent of the total weekly runoff originating above the stateline to flow into the downstream state. Either state may use the beds and banks downstream of segments of this sub-basin, including the mainstem of Red River, for the purpose of conveying its share of water to designated downstream diversions.

4. Interstate Streams-Texas and Arkansas --
The State of Texas shall have free and unrestricted use of the waters of this sub-basin as designated in Par. A. 4., subject to the limitation that Texas shall allow a quantity of water equal to 40 percent of the total weekly runoff originating below the last downstream major dam sites in Texas to flow into Arkansas, provided that Texas may use the beds and banks downstream of this sub-basin, including

the mainstem of Sulphur River and McKinney Bayou, for the purpose of conveying water originating in this sub-basin to designated downstream diversions.

5. Mainstem-Red River --

The States of Oklahoma, Texas and Arkansas shall have free and unrestricted use of the waters of this sub-basin as designated in Par. A. 5., provided that:

a. Oklahoma and Texas shall make no diversions of the natural flow originating in the segment between Denison Dam and the Oklahoma-Arkansas stateline until the undesignated flow at the Oklahoma-Arkansas stateline shall have reached 300 cfs;

b. Arkansas and Texas shall make no diversions of the natural flow originating in the segment between the Oklahoma-Arkansas stateline and the Texas-Arkansas stateline until the undesignated flow at the Texas-Arkansas stateline shall have reached 400 cfs;

c. Arkansas shall make no diversions of the natural flow originating in the segment between the Texas-Arkansas stateline and the Arkansas-Louisiana stateline until the undesignated flow at the Arkansas-Louisiana stateline shall have reached 650 cfs;

d. Oklahoma and Texas shall allow a quantity of water equal to 40 percent of the total weekly runoff originating in their respective states in the segment between Denison Dam and the Oklahoma-Arkansas stateline in excess of the 300 cfs of Par. B. 5. a. to pass the Oklahoma-Arkansas stateline as undesignated flow for Louisiana;

e. Arkansas and Texas shall allow a quantity of water equal to 40 percent of the total weekly runoff originating in their respective states in the segment between the Oklahoma-Arkansas stateline and the Arkansas-Texas stateline in excess of the 400 cfs of Par. B. 5. b. to pass the Arkansas-Texas stateline as unde-

signated flow for Louisiana;

f. Arkansas shall allow a quantity of water equal to 40 percent of the total weekly runoff originating in Arkansas in the segment between the Arkansas-Texas stateline and the Arkansas-Louisiana stateline in excess of the 650 cfs of Par. B. 5. c. to pass the Arkansas-Louisiana stateline as undesignated flow for Louisiana;

g. Oklahoma, Texas or Arkansas may pass any of that State's portion of water originating in a sub-basin as defined in Paragraphs A. 1., A. 2., A. 3., and/or A. 4., and reserve ownership of such water for designated downstream diversions.

h. Oklahoma or Texas may pass any of that State's share of water originating in Reach I and reserve ownership of such waters for designated downstream diversions.

i. Floodwaters and waters used in power generation passed from Reach I shall be shared 50-50 by Oklahoma and Texas downstream and may be designated by

either state for downstream diversions.

C. No state guarantee to maintain a minimum low flow to a downstream state, however, the States of Oklahoma, Texas and Arkansas mutually agree to regulate under their respective state laws, the diversion of runoff originating in the Mainstem-Red River sub-basin as designated in Par. A. 5. and the diversion of designated water passed from upstream sub-basins or Reach I; in compliance with the provisions of Par. B. 5.

D. The administrative body established by this compact adopt rules, regulations and modes of procedure for:

1. Obtaining hydrologic records to properly implement and operate this compact; and,
2. Accounting runoff from each stream sub-basin on a weekly basis, summarized and reported on the water-year basis by March 1 of the following year.

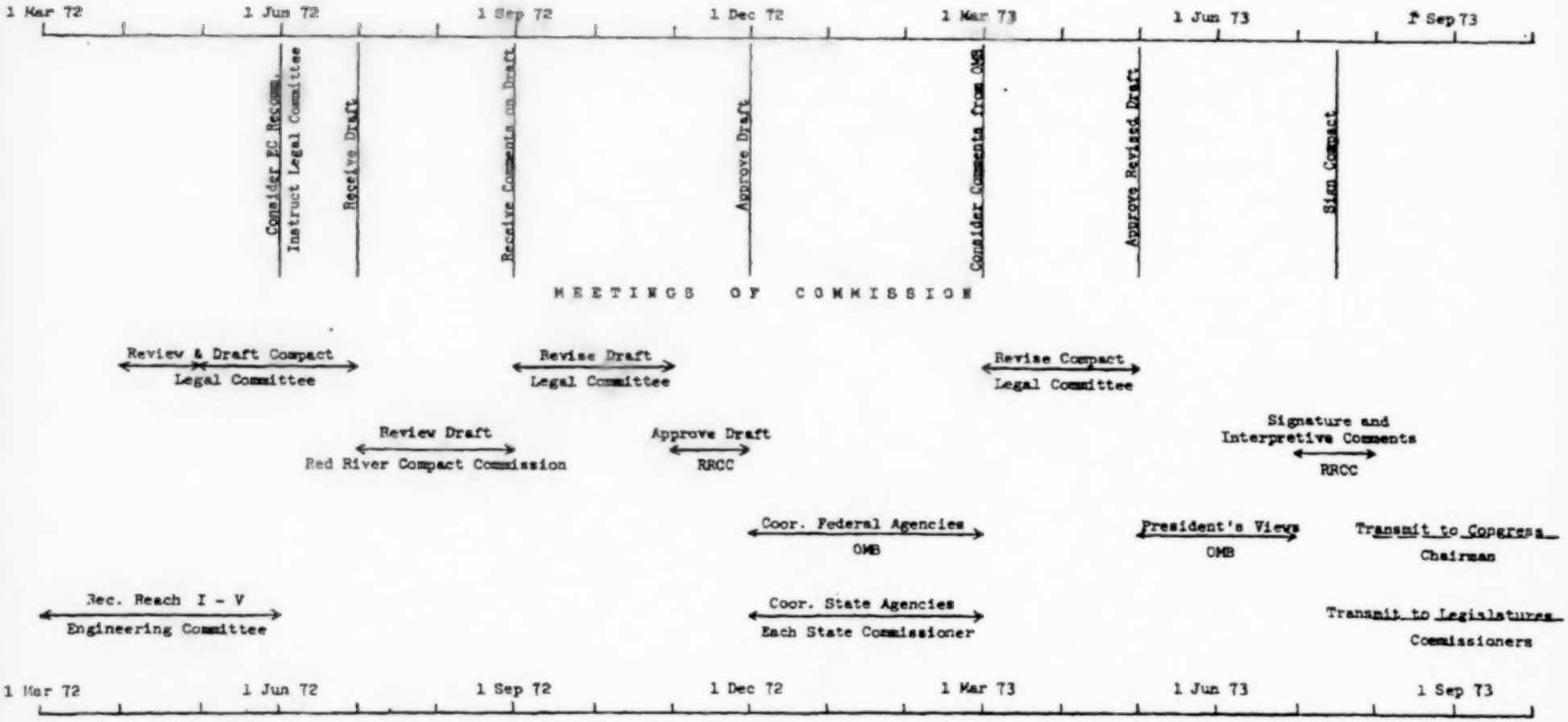
Recommendation by State of Louisiana for inclusion as part of introductory paragraph under Part B, page 5 of Jan 1972, Texas draft of Reach II recommendations.

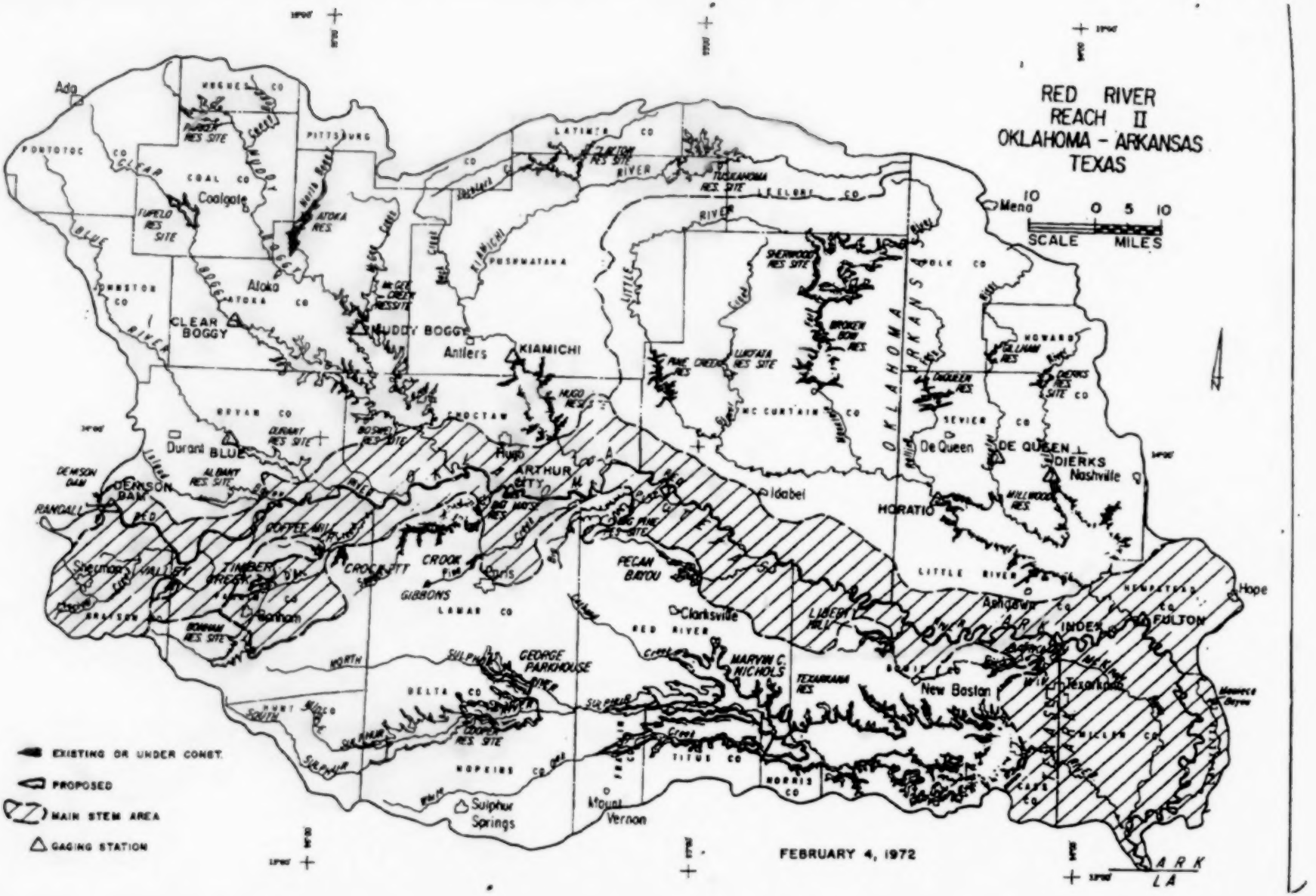
1. Designater releases which may be required for specific purposes, such as navigation and water quality, may not be used or considered as a part of the equitable share of the states through which it passes until it has achieved its designated purpose.

2. All undesignated releases from the aforementioned sub-basins in the States of Oklahoma, Texas and Arkansas shall be considered as a part of the flow of the Mainstem Red River sub-basin and subject to division of flow as outlined herein. This will include power releases and/or other spillages.

Final Exhibit 1

RED RIVER COMPACT SCHEDULE




RED RIVER
REACH II
OKLAHOMA - ARKANSAS
TEXAS
SCALE MILES
10 0 5 10
EXISTING OR UNDER CONST.
PROPOSED
MAIN STEM AREA
GAGING STATION
FEBRUARY 4, 1972
Ada
Coalgate
Atoka
CLEAR BOGGY
MUDDY BOGGY
Antlers
KIAMICHI
Durant
BLUE
DENISON DAM
RANDALL
Sherman
Bonham
TIMBER CREEK
COFFEE MILL
CROCKETT
CROOK
GIBBONS
Paris
ARTHUR CITY
Hugo
Idabel
PECAN BAYOU
Clarksville
MARVIN C. NICHOLS
LIBERTY HILL
GEORGE PARKHOUSE
Sulphur Springs
Mount Vernon
New Boston
Texarkana
Ashdown
INDEX
FULTON
Hope
HORATIO
De Queen
DE QUEEN
DIERKS
Nashville
Mena
OKLAHOMA
ARKANSAS
ARK
LA

~~DRAFT~~

MINUTES OF THE 45th MEETING
RED RIVER COMPACT COMMISSION
DALLAS, TEXAS
15 SEPTEMBER 1972

Approved at 46th Meeting on March 30, 1973, Dallas, Texas

The 45th meeting of the Red River Compact Commission was convened at 9 a.m., 15 September 1972, in the Adolphus Hotel, Dallas, Texas. An attendance list is attached (Inclosure 1). General Noble welcomed Mr. John P. Saxton, of Arkansas, and Mr. H. Deskins Wells, of Texas, as new Commissioners replacing Mr. Keith Jackson and Mr. Ralph Elliott, respectively. Each Commissioner then introduced the other representatives from his State. General Noble recognized Mr. Calvin Watts, Executive Director of the Red River Valley Association, who was an original member of the Compact Commission.

The Minutes of the 44th Meeting were read and approved.

Mr. Guy Keith's letter concerning the apportionment of water in Reach I was read (Inclosure 2). Mr. Keith further reported that work on ideas that have been generated is continuing, and that he anticipates that Texas and Oklahoma will soon agree on acceptable terms for the compact in Reach I. This may require the separation of items of disagreement which will be settled in some other manner.

Mr. Alan Haws presented the results of the Engineering Advisory Committee studies on Reach II in response to a directive by the Compact Commission at the 16 February 1972 meeting. The purpose of this study was to show the allocation of water for the years 1944, 1956, 1963, and 1964 under the terms for the compact proposed by the Engineering Advisory

Committee. Basically, the computer results run by the Texas Water Development Board show the division of water among the four States that originates below the most downstream dams on the tributaries. In addition, the computer printout shows the releases from these reservoirs for these years under the present operations. The Louisiana Commissioner asked for an additional breakdown showing the total amount of water that each State could expect to receive from the area below the most downstream dams, including the reservoir releases. The reservoir releases should be prorated to the States on the same basis as the other flows originating below the most downstream dams. The Texas Water Development Board agreed to add this information on the computer program and to furnish it to the members of the Engineering Advisory Committee. The Louisiana representatives will then either indicate their acceptance of the terms proposed for Reach II by the Engineering Advisory Committee, or make a counterproposal. Subsequent to this action, the Engineering Advisory Committee will meet and prepare recommendations to the Compact Commission in time for consideration at the next meeting.

The Engineering Advisory Committee reported that the last proposal by Texas for Reach III was unacceptable to Louisiana. Additional information on water needs and availability is required before the Louisiana representatives can make a counterproposal. They will try to accomplish this prior to the next meeting of the Compact Commission.

Action concerning the water-quality aspects of the compact since the last meeting was reviewed. On 22 March 1972, General Noble wrote to Dr. Arthur Busch, Regional Administrator for the Environmental Protection Agency, Dallas, Texas, requesting information on Federal interest in water

quality or other matters that are the responsibility of the EPA that should be protected by the Red River Compact. On 11 April 1972, Dr. Busch replied that his agency was developing guidelines regarding regulation of streamflow for quality control, and suggested that action be deferred until the new guidelines are distributed. By letter of 3 May 1972, Dr. Busch furnished a draft of proposed guidelines regarding reservoir storage and releases for flow regulation for water-quality control in Federal reservoirs. Copies of this draft were furnished to each Commissioner. As of the date of the 45th meeting of the Compact Commission, these guidelines had not been adopted by EPA. It was agreed that General Noble would continue to work with the EPA to obtain the position from that agency regarding water-quality matters that should be treated by the Red River Compact.

Mr. Wells expressed his strong desire to arrive at acceptable terms for a compact at an early date, since he felt the task would become more difficult in the future.

The Commissioners agreed that the next meeting would be held in Dallas, Texas, on 15 December 1972.

Meeting adjourned at 11:30 a.m.

2 Incl
As stated

45th MEETING
RED RIVER COMPACT COMMISSION
DALLAS, TEXAS
15 SEPTEMBER 1972

ATTENDANCE LIST

Members of Compact Commission

MG Charles C. Noble	Federal Representative and Chairman, Corps of Engineers, USA	Vicksburg, Miss.
Daniel V. Cresap	Commissioner	Baton Rouge, La.
Guy H. Keith	Commissioner	Oklahoma City, Okla.
John P. Saxton	Commissioner	Little Rock, Ark.
H. Deskins Wells	Commissioner	Wellington, Tex.

Members of Engineering Advisory Committee

Alan Haws	Oklahoma Water Resources Board	Oklahoma City, Okla.
James A. Luscombe, Sr.	Texas Water Rights Commission	Greenville, Tex.
Ivan M. Stout	Texas Water Development Board	Austin, Tex.
A. R. Theis	Louisiana Dept. of Public Works	Baton Rouge, La.

Members of Legal Advisory Committee

Robert H. Mitchell	Oklahoma Attorney General	Oklahoma City, Okla.
Vince Taylor	Assistant Attorney General	Austin, Tex.

Others Present

Jim Aboussie		Altus, Okla.
Fred H. Bayley III	Corps of Engineers, LMVD	Vicksburg, Miss.
E. P. Blankenship	Corps of Engineers, LMVD	Vicksburg, Miss.
Terry Coomes	Corps of Engineers, SWD	Dallas, Tex.
Milton Craig	Alternate Comm. for Okla.	Chandler, Okla.
Otha Dent	Chmn., Texas Water Rights Comm.	Austin, Tex.
Robert B. Harbison	Attorney, Lugert-Altus Irrigation District	Altus, Okla.
Raymond Holsey		Altus, Okla.
N. R. Merryman	Texas Water Development Board	Austin, Tex.
O. B. Saunders	Oklahoma Water Resources Board	Altus, Okla.
Terry L. Thurman	Oklahoma Water Resources Board	Oklahoma City, Okla.
Calvin T. Watts	Red River Valley Association	Shreveport, La.
Robert M. Whitenton	Texas Water Rights Commission	Austin, Tex.

Incl 1

[illegible] • [illegible] • OKLAHOMA • 73112

February 22, 1972

Major General Charles C. Noble
Chairman, Red River Compact Commission
Department of the Army
Lower Mississippi Valley Division
Corps of Engineers
Vicksburg, Mississippi 39180

Dear General Noble:

It was a pleasure to make your acquaintance at the recent Compact Commission meeting and we appreciate greatly the leadership you are providing to help arrive at a Red River Compact.

In regard to the Engineering Committee's report on Reach I, I believe my comments at the recent Compact meeting pretty well cover our thoughts on Reach I.

To summarize briefly, we are basically in accord with a 60-40 split on the streams in this reach, except the North Fork. Our basic question is "if 60-40 is equitable on an undeveloped stream, is it equitable on a developed stream such as the North Fork, where an economy has been established by putting the waters to beneficial use?" We believe Texas should have 60% of the waters of the North Fork for beneficial uses such as municipal or industrial water if a need exists. We do fear the construction of strictly recreation lakes or evaporation ponds. Such impoundments, we feel, are luxuries in a water short area. Releases of such impounded non-beneficial use water to downstream beneficial needs is a possibility that could be explored.

Best personal wishes.

Sincerely yours,

Guy N. Keith
Red River Compact Commissioner
For the State of Oklahoma

Copies:
Judge Otha Dent
Ralph Elliott
Bob Harbison
Robert Mitchell

[illegible] Chairman L. L. MALES, Vice Chairman GUY N. KEITH, Secretary

C.C

Approved at 47th Meeting
Dallas, Texas
3 August 1973

MINUTES OF THE 46TH MEETING
RED RIVER COMPACT COMMISSION
DALLAS, TEXAS
30 MARCH 1973

The 46th meeting of the Red River Compact Commission was convened at 9 a.m., 30 March 1973, in the Adolphus Hotel, Dallas, Texas. An attendance list is attached (Incl 1). In welcoming the participants, General Noble noted that no new commissioners had been named since the last meeting, and expressed his hope that this would enable the Commission to move forward more rapidly to the completion of a contract. Each commissioner then introduced the other representatives from his State. General Noble recognized Mr. Calvin Watts, Executive Director of the Red River Valley Association.

The minutes of the 45th meeting of the Compact Commission were read and approved.

The commissioners discussed the need to include provisions for water quality in the Red River Compact. Mr. Cresap pointed out that the principal concern about water-quality releases in the past compact negotiations was the effect they would have on the division of the quantity of water among the four States. The commissioners agreed that the compact will recognize that the States will comply with State and Federal water-quality standards, but will not attempt to establish a division of water based on water-quality releases. The Engineering Committee was requested to draft appropriate language on water quality for inclusion in the compact.

The commissioners had previously agreed on the division of waters in Reach I, with the exception of North Fork. The Texas and Oklahoma commissioners have been meeting to attempt to resolve the problem on this stream. However, no agreement has been reached to date. It may be necessary to

settle the allocation for this stream in court. If so, this matter would be referred directly to the Supreme Court, who would assign a referee. However, the Texas and Oklahoma commissioners will make another attempt to reach an agreement on the North Fork prior to the next Commission meeting.

Mr. Forrest Nelson, Chairman of the Engineering Advisory Committee, reviewed the recommendations (Incl 2) by the Committee for the division of water in Reach II. General Noble stated that he will personally review the navigation requirements for the Red River Waterway before the next meeting to determine if any language needs to be included in the compact regarding navigation flows and, if needed, what language should be included. Mr. Cresap expressed concern that the compact did not assure that any "free water" passing the most downstream reservoir would be available for Louisiana. The Engineering Committee was requested to rewrite the recommendations to provide that 40 percent of releases from the most downstream reservoirs that have not been designated or paid for for downstream uses shall be allowed to flow past the Arkansas-Louisiana State line.

The commissioners directed the Engineering Advisory Committee to prepare the recommendations on the allocation of water for each reach in the proper format for inclusion in the compact by the Legal Advisory Committee. Each commissioner will furnish his interpretation of the intent of the language providing for the allocation of water to the Legal Advisory Committee.

The Louisiana and Texas representatives on the Engineering Advisory Committee have been requested to make a recommendation on the division of water in Reach III to the full committee. These representatives now feel that they have sufficient information to discuss a proposal for this reach, and will meet in Shreveport at the time of the Red River Valley Association meeting to discuss proposals for each State.

To date, first priority has been given to negotiations on Reaches II and III. Therefore, only limited progress has been made on Reach IV. Louisiana and Arkansas representatives on the Engineering Advisory Committee will meet at the AWRBIAC meeting in Hot Springs in mid-April to initiate discussions on the division of water in Reach IV.

The next meeting of the Red River Compact Commission will be held in Vicksburg, Mississippi, on 15 June 1973.

The meeting adjourned at 11:45 a.m.

2 Incl
As stated

46TH MEETING
RED RIVER COMPACT COMMISSION
DALLAS, TEXAS
30 MARCH 1973

ATTENDANCE LIST

Members of Compact Commission

MG C. C. Noble	Federal Representative and Chairman, Corps of Engineers, USA	Vicksburg, Miss.
Daniel V. Cresap	Commissioner	Baton Rouge, La.
Guy N. Keith	Commissioner	Oklahoma City, Okla.
John P. Saxton	Commissioner	Little Rock, Ark.
H. Deskins Wells	Commissioner	Wellington, Tex.

Members of Engineering Advisory Committee

Richard L. Bennett	Louisiana Dept. of Public Works	Alexandria, La.
Alan Haws	Oklahoma Water Resources Board	Oklahoma City, Okla.
Forrest Nelson	Oklahoma Water Resources Board	Oklahoma City, Okla.
Ivan M. Stout	Texas Water Development Board	Austin, Tex.
A. P. Theis	Louisiana Dept. of Public Works	Baton Rouge, La.
Terry L. Thurman	Oklahoma Water Resources Board	Oklahoma City, Okla.
Robert M. Whitenton	Texas Water Rights Commission	Austin, Tex.

Members of Legal Advisory Committee

Robert H. Mitchell	Oklahoma Attorney General	Oklahoma City, Okla.

Others Present

Fred H. Bayley III	Corps of Engineers, LMVD	Vicksburg, Miss.
E. P. Blankenship	Corps of Engineers, LMVD	Vicksburg, Miss.
John Parks	Corps of Engineers, SWD	Dallas, Tex.
Calvin T. Watts	Red River Valley Association	Shreveport, La.

Incl 1

OKLAHOMA'S
PROPOSAL
FOR REACH II
March 21, 1973

RED RIVER REACH II

RECOMMENDATIONS

A number of different methods for apportioning the waters of Red River Basin, Reach II, have been considered by the Engineering Advisory Committee. The "Drainage Area Method" is not believed to be feasible for Reach II as there is considerable variance in rainfall and runoff throughout this area.

The "Conservation Storage Method" is not believed to be feasible for Reach II because of the limited number of sites available for construction of reservoirs.

The "Percentage of Flow Method" was studied by the Engineering Advisory Committee and is considered feasible in a modified form for Reach II.

The Committee therefore makes the following specific recommendations:

A. For purposes of apportioning the waters of Red River Basin Reach II sub-basins be established as follows:

1. Intrastate Streams-Oklahoma --

   The Intrastate Streams-Oklahoma sub-basin shall consist of those streams and their tributaries above existing, authorized or proposed last downstream major dam sites, wholly in Oklahoma and flowing into Red River below

Incl 2

Denison Dam and above the Oklahoma-Arkansas stateline. These streams and their tributaries with existing, authorized or proposed last downstream major dam sites are as follows:

STREAM	SITE	LOCATION STREAM MILE
Island-Bayou	Albany	6.5
Blue River	Durant	13.0
Boggy River	Boswell	18.9
Kiamichi River	Hugo	17.6

2. Intrastate Streams-Texas --

The Intrastate Streams-Texas sub-basin shall consist of those streams and their tributaries above existing, authorized or proposed last downstream major dam sites, wholly in Texas and flowing into Red River below Denison Dam and above the Texas-Arkansas stateline. These streams and their tributaries with existing, authorized or proposed last downstream major dam sites are as follows:

STREAM	SITE	LOCATION STREAM MILE
Shawnee Creek	Randall	2.0
Brushy Creek	Valley	5.0
Bois d' Arc Creek	Bonham	35.0
(Timber Creek	Timber Creek	2.0)
(Coffee Mill Creek	Coffee Mill	0.5)
(Sandy Creek	Crockett	2.0)

(continued)

STREAM	SITE	LOCATION STREAM MILE
Sanders Creek	Pat Mayes	4.6
Pine Creek	Crook	21.0
Big Pine Creek	Big Pine	13.2
Pecan Bayou	Pecan Bayou	15.0
Mud Creek	Liberty Hill	8.0
Barkman Creek	Barkman	10.0

3. Interstate Streams-Oklahoma and Arkansas --

The Interstate Streams-Oklahoma and Arkansas sub-basin shall consist of those streams and their tributaries above existing, authorized or proposed major dam sites, originating in Oklahoma or Arkansas and crossing the Oklahoma-Arkansas stateline one or more times before flowing into the Red River in Arkansas. These streams and their tributaries with existing, authorized or proposed last downstream major dam sites are as follows:

In Oklahoma -

STREAM	SITE	LOCATION STREAM MILE
Little River	Pine Creek	145.3
Glover Creek	Lukfata	17.3
Mountain Fork River	Broken Bow	20.3

In Arkansas -

STREAM	SITE	LOCATION STREAM MILE
Little River	Millwood	16.0

4. Interstate Streams-Texas and Arkansas --

The Interstate Streams-Texas and Arkansas sub-basin shall consist of those streams and their tributaries above existing, authorized or proposed major dam sites, originating in Texas and crossing the Texas-Arkansas stateline before flowing into the Red River in Arkansas. These streams and their tributaries with existing, authorized or proposed last downstream major dam sites are as follows:

STREAM	SITE	LOCATION STREAM MILE
McKinney Bayou		
(Clear Fork Creek	Waterworks	1.5)
Sulphur River	Texarkana	45.0

5. Mainstem-Red River --

The Mainstem-Red River sub-basin shall consist of all those streams and their tributaries flowing into Red River below Denison Dam and above the Arkansas-Louisiana stateline not specifically included in the other four sub-basins of Reach II.

B. For purposes of apportioning the waters of Red River Reach II, the "Percentage of Flow Method" be used to divide the flows of the five sub-basins established by Para. A. as follows:

1. Intrastate Streams - Oklahoma --

The State of Oklahoma shall have free and unrestricted use of the waters of this sub-basin as designated by Para. A. 1., provided that Oklahoma may use the beds and banks downstream of thi

sub-basin, including the mainstem of Red River, for the purpose of conveying water originating in this sub-basin to designated downstream diversions, subject to the low flow requirements set forth in Para. B. 5, (a) through (i).

2. Intrastate Streams-Texas --

The State of Texas shall have free and unrestricted use of the waters of this sub-basin as designated by Para. A. 2., provided that Texas may use the beds and banks downstream of this sub-basin, including the mainstem of Red River, for the purpose of conveying water originating in this sub-basin to designated downstream diversions, subject to the low flow requirements set forth in Para. B. 5., (a) through (i).

3. Interstate Streams-Oklahoma and Arkansas --

The States of Oklahoma and Arkansas shall each have free and unrestricted use of the waters of this sub-basin as designated in Para. A. 3., subject to the limitation that Oklahoma and Arkansas shall allow a quantity of water equal to 40 percent of the annual runoff originating below the last downstream major dam sites in their respective states to flow into the downstream state. Where there are no designated last downstream dam sites, the upstream state shall allow a quantity of water equal to 40 percent of the total annual runoff originating above the stateline to flow into the downstream state. Either state may use the beds and banks downstream of segments of this sub-basin, including the mainstem of Red River, for the purpose of conveying its share of water to designated downstream diversions, subject to the low flow requirements set forth in Para. B. 5., (a) through (i).

4. Interstate Streams-Texas and Arkansas --

The State of Texas shall have free and unrestricted use of the waters of this sub-basin as designated in Para. A. 4., subject to the limitation that Texas shall allow a quantity of water equal to 40 percent of the total annual runoff originating below the last downstream major dam sites in Texas to flow into Arkansas, provided that Texas may use the beds and banks downstream of this sub-basin, including the Mainstem of Sulphur River and McKinney Bayou, for the purpose of conveying water originating in this sub-basin to designated downstream diversions, subject to the low flow requirements set forth in Para. B. 5., (a) through (i).

5. Mainstem-Red River --

The States of Oklahoma, Texas and Arkansas shall have free and unrestricted use of the waters of this sub-basin as designated in Para. A. 5., provided that:

(a) Overall accounting and allocation of flows will not be required when the flow at the Arkansas-Louisiana stateline exceeds 3000 cfs.

(b) If the flow at the Arkansas-Louisiana stateline falls below 3000 cfs, the States of Oklahoma, Texas and Arkansas shall allow a quantity of water up to 40 percent of the weekly runoff originating within their respective states from the Mainstem-Red River to flow into Red River as undesignated flow for Louisiana as required to maintain 3000 cfs. at the Arkansas-Louisiana stateline.

(c) If the flow at the Arkansas-Louisiana state line falls below 600 cfs, the States of Oklahoma, Texas and Arkansas shall allow a quantity of water up to 40 percent of the weekly runoff from their respective states (provided this quantity of water is not required to serve statutory water rights existing on the effective date of the Compact) to flow into the Mainstem-Red River as designated flow (water supply) for Louisiana up to 600 cfs.

(d) The Federal Government (through the US Army Corps of Engineers) shall plan to provide supplemental flows as needed to meet navigation requirements recognizing that the State of Louisiana requires a minimum flow of 600 cfs at the Arkansas-Louisiana state line to meet the Louisiana water supply needs.

(e) The States of Oklahoma, Texas and/or Arkansas may pass any of that states' portion of water originating in a sub-basin as defined in Para. A. 1., A. 2., A. 3., and/or A. 4., and reserve ownership of such water for designated downstream diversions.

(f) Oklahoma and/or Texas may pass any of that State's share of water originating in Reach I into Reach II and reserve ownership of such water for designated downstream diversion

(g) Flood water and water used in power generation passed from Reach I into Reach II shall be shared by the States of Oklahoma and Texas on a contributing share basis and may be designated by either state for downstream diversions.

C. No state guarantees to maintain a minimum low flow to a downstrea state, however, the States of Oklahoma, Texas and Arkansas mutually agree regulate under their respective state laws the diversion of runoff origina in the Mainstem-Red River sub-basin as designated in Para. A. 5., and the diversion of designated water passed from upstream sub-basins or Reach I, in compliance with the provisions of Para. B. 5.

D. The administrative body established by this compact adopt rules, regulations and modes of procedure for:

1. Obtaining hydrologic records to properly implement and operate this compact; and,
2. Accounting runoff from each stream sub-basin on a weekly basis, summarized and reported on the water-year basis by March 1 of the following year.

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DRAFT

MINUTES OF THE 47th MEETING
RED RIVER COMPACT COMMISSION
DALLAS, TEXAS
3 AUGUST 1973

The 47th meeting of the Red River Compact Commission was convened at 9 a.m., 3 August 1973, in the Adolphus Hotel, Dallas, Texas. An attendance list is attached (Inclosure 1). In welcoming the participants, General Noble recognized Mr. Orville Saunders as the new Commissioner for the State of Oklahoma, and expressed his appreciation for the outstanding services rendered by Mr. Guy Keith. Each Commissioner then introduced the other representatives from his State. General Noble recognized Mr. Calvin Watts, Executive Director of the Red River Valley Association.

The minutes of the 46th meeting were read and approved.

The Oklahoma and Texas Commissioners reported that meetings had been held concerning the division of waters on the North Fork in Reach I, but no progress had been made toward a satisfactory agreement on this stream. Mr. Robert Harbison, the Attorney for the Altus-Lugert Irrigation District, suggested that the compact recognize that litigation would be required, and that, subsequent to the litigation, the water would be allocated in accordance with the decision of the court. The Legal Advisory Committee was asked to review this proposal, and to give its views at the next meeting of the Compact Commission. Oklahoma representatives stated that they would agree that Texas could receive all water for M&I purposes on the North Fork for which they could demonstrate a reasonable need. Mr. Wells stated that

Incl 2

he would carry this position back and review it with advisors in Texas. He stated that it was his opinion that the Compact Commissioners should strive to develop a compact that would have a reasonable chance of passing the State Legislatures. General Noble expressed his desire to reach an agreement on the division of the waters of the North Fork, if at all possible, rather than recognize litigation in the compact.

Mr. Forrest Nelson, Chairman of the Engineering Advisory Committee, presented the report for his group. He recommended that the compact draft include language on water quality similar to that provided in the compact for the Arkansas River, in which the States recognize State and Federal water-quality standards. He proposed that the language covering water quality be developed after the State standards are approved. Next, Mr. Nelson reviewed the status of reservoir construction in Reach II, and presented the recommendations of the Engineering Advisory Committee for the division of water in this reach (Inclosure 2). Mr. Cresap commended the Engineering Advisory Committee for the excellent effort to date. The Commission accepted the report for consideration and review prior to the next meeting in preparation for turning it over to the Legal Advisory Committee for final drafting. The Chairman of the Legal Advisory Committee will attend the next meeting to hear any comments made by the Commissioners.

Louisiana representatives will meet in Shreveport to review water needs in the Cypress Basin after 1 September 1973. The Engineering Advisory

Committee will try to have a proposal for Reach III ready for presentation to the Compact Commission at the next meeting.

The Arkansas representative stated that he needed additional time to study the water needs in Reach IV. As a result, they probably will not be ready to make a proposal for the division of the water in this reach by the next Compact Commission meeting; however, they will make every effort possible.

The Commissioners unanimously approved a resolution commending Mr. Guy Keith for his valuable services as the Commissioner for the State of Oklahoma (Inclosure 3).

The next meeting of the Compact Commission will be held in Vicksburg, Mississippi, on 8 and 9 November 1973.

The meeting adjourned at 11:45 a.m.

3 Incl
As stated

47th MEETING
RED RIVER COMPACT COMMISSION
DALLAS, TEXAS
3 AUGUST 1973

ATTENDANCE LIST

Members of Compact Commission

MG C. C. Noble	Federal Representative and Chairman, Corps of Engineers, USA	Vicksburg, Miss.
Daniel V. Cresap	Commissioner	Baton Rouge, La.
Orville B. Saunders	Commissioner	Altus, Okla.
John P. Saxton	Commissioner	Little Rock, Ark.
H. Deskins Wells	Commissioner	Wellington, Tex.

Members of Engineering Advisory Committee

Richard L. Bennett	Louisiana Dept. of Public Works	Alexandria, La.
Americ Bryniarski	Arkansas Division of Soil & Water	Little Rock, Ark.
Forrest Nelson	Oklahoma Water Resources Board	Oklahoma City, Okla
Ivan M. Stout	Texas Water Development Board	Austin, Tex.
A. P. Theis	Louisiana Dept. of Public Works	Baton Rouge, La.
Terry L. Thurman	Oklahoma Water Resources Board	Oklahoma City, Okla
Robert M. Whitenton	Texas Water Rights Commission	Austin, Tex.

Members of Legal Advisory Committee

John F. Gibson, Jr.	Arkansas Division of Soil & Water	Little Rock, Ark.
Robert H. Mitchell	Oklahoma Attorney General	Oklahoma City, Okla
Ken Norman	Asst. Attorney General of Texas	Houston, Tex.

Others Present

Fred H. Bayley III	Corps of Engineers, LMVD	Vicksburg, Miss.
E. P. Blankenship	Corps of Engineers, LMVD	Vicksburg, Miss.
John Collins	Altus-Lugert Irrigation Project	Altus, Okla.
R. Terry Coomes	Corps of Engineers, SWD	Dallas, Tex.
Robert B. Harbison	Altus-Lugert Irrigation Project	Altus, Okla.
John C. Prescott	Oklahoma Water Resources Board	Altus, Okla.
Clinton L. Sumrall, Jr.	Corps of Engineers, LMVD	Vicksburg, Miss.
Calvin T. Watts	Red River Valley Association	Shreveport, La.

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ENGINEERING COMMITTEE
PROPOSAL TO
COMMISSION
AUGUST 3, 1973

RED RIVER REACH II

RECOMMENDATIONS

A number of different methods for apportioning the waters of Red River Basin, Reach II, have been considered by the Engineering Advisory Committee. The "Drainage Area Method" is not believed to be feasible for Reach II as there is considerable variance in rainfall and runoff throughout this area.

The "Conservation Storage Method" is not believed to be feasible for Reach II because of the limited number of sites available for construction of reservoirs.

The "Percentage of Flow Method" was studied by the Engineering Advisory Committee and is considered feasible in a modified form for Reach II.

The Committee therefore makes the following specific recommendations:

A. For purposes of apportioning the waters of Red River Basin Reach II sub-basins be established as follows:

1. Intrastate Streams-Oklahoma --

   The Intrastate Streams-Oklahoma sub-basin shall consist of those streams and their tributaries above existing, authorized or proposed last downstream major dam sites, wholly in Oklahoma and flowing into Red River below Denison Dam and above the Oklahoma-Arkansas stateline. These streams and their tributaries with existing, authorized or proposed last downstream major dam sites are as follows:

STREAM	SITE	LOCATION STREAM MILE
Island-Bayou	Albany	6.5
Blue River	Durant	13.0
Boggy River	Boswell	18.9
Kiamichi River	Hugo	17.6

2. Intrastate Streams-Texas --

The Intrastate Streams-Texas sub-basin shall consist of those streams and their tributaries above existing, authorized or proposed last downstream major dam sites, wholly in Texas and flowing into Red River below Denison Dam and above the Texas-Arkansas stateline. These streams and their tributaries with existing, authorized or proposed last downstream major dam sites are as follows:

STREAM	SITE	LOCATION STREAM MILE
Shawnee Creek	Randall	2.0
Brushy Creek	Valley	5.0
Bois d' Arc Creek	Bonham	35.0
(Timber Creek	Timber Creek	2.0)
(Coffee Mill Creek	Coffee Mill	0.5)
(Sandy Creek	Crockett	2.0)
Sanders Creek	Pat Mayes	4.6
Pine Creek	Crook	21.0
Big Pine Creek	Big Pine	13.2
Pecan Bayou	Pecan Bayou	15.0
Mud Creek	Liberty Hill	8.0
Barkman Creek	Barkman	10.0

3. Interstate Streams-Oklahoma and Arkansas --

The Interstate Streams-Oklahoma and Arkansas sub-basin shall consist of those streams and their tributaries above existing, authorized or

proposed major dam sites, originating in Oklahoma or Arkansas and crossing the Oklahoma-Arkansas stateline one or more times before flowing into the Red River in Arkansas. These streams and their tributaries with existing, authorized or proposed last downstream major dam sites are as follows: In Oklahoma -

STREAM	SITE	LOCATION STREAM MILE
Little River	Pine Creek	145.3
Glover Creek	Lukfata	17.3
Mountain Fork River	Broken Bow	20.3

In Arkansas -

STREAM	SITE	LOCATION STREAM MILE
Little River	Millwood	16.0

4. Interstate Streams-Texas and Arkansas --

The Interstate Streams-Texas and Arkansas sub-basin shall consist of those streams and their tributaries above existing, authorized or proposed major dam sites, originating in Texas and crossing the Texas-Arkansas stateline before flowing into the Red River in Arkansas. These streams and their tributaries with existing, authorized or proposed last downstream major dam sites are as follows:

STREAM	SITE	LOCATION STREAM MILE
McKinney Bayou		
(Clear Fork Creek	Waterworks	1.5)
Sulphur River	Texarkana	45.0

5. Mainstem-Red River --

The Mainstem-Red River sub-basin shall consist of all those streams and their tributaries flowing into Red River below Denison Dam and above the Arkansas-Louisiana stateline not specifically included in the other four sub-basins of Reach II.

B. For purposes of apportioning the waters of Red River Reach II, the "Percentage of Flow Method" be used to divide the flows of the five sub-basins established by Para. A. as follows:

1. Intrastate Streams - Oklahoma --

The State of Oklahoma shall have free and unrestricted use of the waters of this sub-basin as designated by Para. A. 1., provided that Oklahoma may use the beds and banks downstream of this sub-basin, including the mainstem of Red River, for the purpose of conveying water originating in this sub-basin to designated downstream diversions, subject to the low flow requirements set forth in Para. B. 5, (a) through (g).

2. Intrastate Streams-Texas --

The State of Texas shall have free and unrestricted use of the waters of this sub-basin as designated by Para. A. 2, provided that Texas may use the beds and banks downstream of this sub-basin, including the mainstem of Red River, for the purpose of conveying water originating in this sub-basin to designated downstream diversions, subject to the low flow requirements set forth in Para. B. 5., (a) through (g).

3. Interstate Streams-Oklahoma and Arkansas --

The States of Oklahoma and Arkansas shall each have free and unrestricted use of the waters of this sub-basin as designated in Para. A. 3., subject to the limitation that Oklahoma and Arkansas shall allow a

quantity of water equal to 40 percent of the annual runoff originating below the last downstream major dam sites in their respective states to flow into the downstream state. Where there are no designated last downstream dam sites, the upstream state shall allow a quantity of water equal to 40 percent of the total annual runoff originating above the stateline to flow into the downstream state. Either state may use the beds and banks downstream of segments of this sub-basins, including the mainstem of Red River, for the purpose of conveying its share of water to designated downstream diversions, subject to the low flow requirements set forth in Para. B. 5., (a) through (g).

4. Interstate Streams-Texas and Arkansas --

The State of Texas shall have free and unrestricted use of the waters of this sub-basin as designated in Para. A. 4., subject to the limitation that Texas shall allow a quantity of water equal to 40 percent of the total annual runoff originating below the last downstream major dam sites in Texas to flow into Arkansas, provided that Texas may use the beds and banks downstream of this sub-basin, including the Mainstem of Sulphur River and McKinney Bayou, for the purpose of conveying water originating in this sub-basin to designated downstream diversions, subject to the low flow requirements set forth in Para. B. 5., (a) through (g).

5. Mainstem-Red River --

The States of Oklahoma, Texas and Arkansas shall have free and unrestricted use of the waters of this sub-basin as designated in Para. A. 5., provided that:

(a) Overall accounting and allocation of flows will not be required when the flow at the Arkansas-Louisiana stateline exceeds 3000 cfs.

(b) If the flow at the Arkansas-Louisiana stateline falls below 3000 cfs, the States of Oklahoma, Texas and Arkansas shall allow a quantity of water up to 40 percent of the weekly runoff originating within their respective states from the Mainstem-Red River to flow into Red River as undesignated flow for Louisiana as required to maintain 3000 cfs. at the Arkansas-Louisiana stateline and 40 percent of releases from the most downstream reservoirs which have not been designated or paid for for downstream uses.

(c) If the flow at the Arkansas-Louisiana state line falls below 1000 cfs, the States of Oklahoma, Texas, and Arkansas shall allow a quantity of water up to 40 percent of the weekly runoff from their respective states (provided this quantity of water is not required to serve statutory water rights existing on the effective date of the Compact) to flow into the Mainstem-Red River as designated flow for Louisiana up to 1000 cfs.

(d) The Federal Government shall plan to provide supplemental flows as needed to meet navigation requirements recognizing that the State of Louisiana needs a minimum flow as indicated in (c) above.

(e) The States of Oklahoma, Texas and/or Arkansas may pass any of that states' portion of water originating in a sub-basin as defined in Para. A.1., A.2., A.3., and/or A.4., and reserve ownership of such water for designated downstream diversions.

(f) Oklahoma and/or Texas may pass any of that State's share of water originating in Reach I into Reach II and reserve ownership of such water for designated downstream diversions.

(g) Flood water and water used in power generation passed from Reach I into Reach II shall be shared by the States of Oklahoma and Texas on a contributing share basis and may be designated by either state for downstream diversions.

C. No state guarantees to maintain a minimum low flow to a downstream state, however, the States of Oklahoma, Texas and Arkansas mutually agree to regulate under their respective state laws the diversion of runoff originating in the Mainstem-Red River sub-basin as designated in Para. A. 5., and the diversion of designated water passed from upstream sub-basins or Reach I, in compliance with the provisions of Para. B. 5.

D. The administrative body established by this compact adopt rules, regulations and modes of procedure for:

1. Obtaining hydrologic records to properly implement and operate this compact; and,
2. Accounting runoff from each stream sub-basin on a weekly basis, summarized and reported on the water-year basis by March 1 of the following year.

GUY N. KEITH

WHEREAS GUY N. KEITH has served as a member of the Red River Compact Commission since 1966, by appointment of the then Oklahoma Governor Henry Bellmon;

WHEREAS, as Oklahoma's representative to this commission, GUY N. KEITH has endeavored toward a fair and equitable division of water among the states of Arkansas, Louisiana, Oklahoma, and Texas;

WHEREAS the waters within the reaches of the Red River are of utmost importance to the people of the states involved for municipal, irrigation, and recreational purposes, and GUY N. KEITH has diligently worked to protect this water for all concerned; and

WHEREAS, during his years of tenure on this commission, GUY N. KEITH has dedicated his time, knowledge, and interest to the waters of the Red River; now, therefore,

BE IT RESOLVED that his fellow members of the Red River Compact Commission do hereby commend GUY N. KEITH for the invaluable services he has rendered in protecting, preserving, and conserving the waters of the Red River.

Adopted this 3rd day of August, 1973.

RED RIVER COMPACT COMMISSION

Major General Charles C. Noble
Federal Representative and Chairman

Daniel V. Cresap, Louisiana

John P. Saxton, Arkansas

Orville B. Saunders, Oklahoma

H. Deskin Wells, Texas

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MINUTES OF THE 48th MEETING
RED RIVER COMPACT COMMISSION
M/V MISSISSIPPI
VICKSBURG, MISSISSIPPI
8 NOVEMBER 1973

The 48th meeting of the Red River Compact Commission was convened at 7:25 p.m., 8 November 1973, on the M/V Mississippi. An attendance list is attached (Inclosure 1). In welcoming the participants, General Noble asked each Commissioner present or represented to introduce other representatives from his State.

The minutes of the 47th meeting were read and followed by a discussion of the statement concerning the views of Oklahoma representatives on Texas' receiving M&I water from North Fork. It was agreed that the statement in question did not necessarily represent the official position of the State of Oklahoma and should be revised accordingly. With this modification, the minutes of the 47th meeting were approved.

A letter from Mr. Robert B. Harbison regarding the allocation of water of the North Fork and Sweet Water Creeks was read by Mr. Fred Bayley, and subsequently discussed. During this discussion, Messrs. Wells and Saunders went on record as being optimistic that difficulties regarding water allocation can be resolved.

Mr. Belanger gave the report of the Legal Advisory Committee and concluded that the compacting states should not recognize at this time that litigation would be required.

Encl 1

General Noble opened the consideration of the recommendations prepared by the Engineering Advisory Committee, concerning the division of water in Reach II. After considerable discussion, the Commission agreed to present the recommendations to the Legal Advisory Committee for final drafting. The Committee members representing Arkansas and Louisiana stipulated that their approval was contingent on additional analysis and consideration of the language presented in subparagraph 5(c).

General Noble continued the Commission meeting with a request for a report on the proposals regarding the flow distribution in the other reaches. A discussion of some of the problems being encountered followed, and a motion was made and passed that the Engineering Advisory Committee initiate a new study of the problems associated with the North Fork River. It was also agreed that proposals regarding Reaches III and IV would be prepared and presented at the next Commission meeting.

A statement prepared by the Arkansas representatives regarding Reach IV was presented and discussed (Inclosure 2).

The methods and/or objectives associated with preparation of the minutes of Commission meetings were discussed. It was concluded that minutes should be distributed to Commission members within a reasonable period of time following the meeting, and sufficient time to prepare for the next meeting should be provided.

The next meeting of the Compact Commission will be held in Dallas, Texas, on 1 March 1974.

The meeting adjourned at 9:45 p.m.

2 Incl
As stated

48th MEETING
RED RIVER COMPACT COMMISSION
M/V MISSISSIPPI
VICKSBURG, MISSISSIPPI
8 NOVEMBER 1973

ATTENDANCE LIST

Members of Compact Commission

MG C. C. Noble	Federal Representative and Chairman, Corps of Engineers, USA	Vicksburg, Miss.
Daniel V. Cresap	Commissioner	Baton Rouge, La.
Orville B. Saunders	Commissioner	Altus, Okla.
Joe Mott	Commissioner (Alternate)	Little Rock, Ark.
H. Deskins Wells	Commissioner	Wellington, Tex.

Members of Engineering Advisory Committee

Richard L. Bennett	Louisiana Dept. of Public Works	Alexandria, La.
Americ Bryniarski	Arkansas Division of Soil & Water	Little Rock, Ark.
Forrest Nelson	Oklahoma Water Resources Board	Oklahoma City, Okla.
Ivan M. Stout	Texas Water Development Board	Austin, Tex.
A. P. Theis	Louisiana Dept. of Public Works	Baton Rouge, La.
William Krause	Texas Water Development Board	Austin, Tex.

Members of Legal Advisory Committee

Homer J. Belanger	Louisiana Dept. of Public Works	Baton Rouge, La.
John F. Gibson	Arkansas Division of Soil & Water	Little Rock, Ark.
Ken Norman	Asst. Attorney General of Texas	Houston, Tex.

Others Present

Fred H. Bayley III	Corps of Engineers, LMVD	Vicksburg, Miss.
R. Terry Coomes	Corps of Engineers, SWD	Dallas, Tex.
Clinton L. Sumrall, Jr.	Corps of Engineers, LMVD	Vicksburg, Miss.

Presented to Red River Compact Commission Meeting at Vicksburg, Mississippi November 9, 1973.

Position Statement of State of Arkansas regarding the Red River Compact.

The State of Arkansas, along with other states involved in the negotiations for the formulation of an interstate compact for the apportionment of the waters of the Red River Basin, is seriously concerned with the long delays attendant to these negotiations, which have been underway for some seventeen years. We are sincerely hopeful that satisfactory agreements can be reached between all parties concerned and that an acceptable compact can be ratified at a reasonably early date.

I perceive the feeling on the part of some that we are being obstructionist towards the negotiation of a compact and are unreasonable in our refusal to accept earlier proposals concerning the allocation of waters between Arkansas and Louisiana in Reach IV.

At the outset we would like to reiterate our previous suggestion (1966) that the Ouachita River Basin not be included in any compact for the apportionment of waters of the Red River Basin. For all practical purposes the flows of the Ouachita can be considered a part of the Lower Mississippi River system and have no relation to problems involving any but the states of Arkansas and Louisiana. The recognition of this basin as a separate hydrologic unit has been indicated in the formulation of comprehensive river-basin planning. The Type II Study, Red River below Denison Dam, did not include this stream system, and the Type I Study for the Lower Mississippi River Basin does include the Ouachita Basin rather than considering it a part of the Arkansas-White-Red Basins.

As the State of Louisiana has unequivocally objected to the deletion of the Ouachita Basin from the proposed Compact, we feel that the

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problems involving Reach IV should be approached on a different basis than for other portions of the Basin for reasons outlined below.

The State of Arkansas, in contrast to other "upstream" states, does not recognize the appropriation doctrine. Rather it has adopted, with minor modifications, the riparian doctrine of reasonable use. Under this doctrine, stream waters may be used without restrictions for domestic use, and for other uses so long as such uses do not unreasonably affect other riparian owners. Provision is made, however, by Arkansas law for the state to make equitable allocations of stream waters between users during periods of shortage.

In line with the above, we do not feel that we can agree to any specific, quantitative apportionment of waters of the interstate streams flowing from Arkansas into Louisiana. To do so would be giving to water users in Louisiana assured rights that we are unable to grant to our own citizens.

The principal water problem in this Reach is too much water rather than too little. Other than the main stem of the Ouachita River and Bayou Bartholomew, the streams in question have very small, or no flow during dry periods and, to our knowledge, very little dependence is made upon such supplies. There are generally large supplies of ground water in this area. As ground water levels are lowered by pumping it may well further reduce low streamflows.

In conclusion, I strongly feel that the inclusion of specific apportionment of waters between the states of Arkansas and Louisiana would serve little useful purpose to either state. There is, however, a need for cooperation between the two states on water projects affecting both states For example, there are several Arkansas projects in the planning stage at the present time that will provide benefits in both states-viz., Bayou Dorcheat, Bayou Bartholomew, Lake Chicot, and several small watershed projects. It is suggested that some interstate authority or agreement

would be desirable to cover this type of project and would cover more than merely an apportionment of the waters between the two states. What I'm trying to stress is that, rather than making provisions for sharing our shortages, the two states should cooperate in all possible ways to promote the proper development and management of water resources that are of mutual concern.

DRAFT
Flanagan/eb/306
19 June 1974

MINUTES OF THE 49th Meeting
RED RIVER COMPACT COMMISSION
ADOLPHUS HOTEL
DALLAS, TEXAS

13 JUNE 1974

The 49th meeting of the Red River Compact Commission was convened at 9 a.m., 13 June 1974, in the Directors Room, Adolphus Hotel, Dallas, Texas. An attendance list is attached (Inclosure 1). In welcoming the participants, General Noble asked each Commissioner present or represented to introduce others from his State.

The minutes of the 48th meeting were read and approved.

Mr. Nelson gave a report from the Engineering Advisory Committee. He indicated that the only problem in compacting Reach I remained the division of waters from the North Fork. Mr. Saunders stated that the problem was with the Altus-Lugert Irrigation District, which wanted a 70-30 split in the water. Mr. Krause, of Texas, indicated that, while Texas would not agree to a 70-30 split, he had confidence that an agreement could be made quickly if other portions of the compact were resolved. This could be done by (a) leaving it out of the compact; (b) litigation, with both sides pressing for an early resolution; or (c) mutual agreement within the compact. It was agreed that the Texas and Oklahoma delegations would continue searching for a solution on the North Fork.

Mr. Belanger stated that the Legal Committee had put into compact language the Engineering Advisory Committee's recommendations for Reach II as it was charged to do at the last meeting (see Inclosure 2). He indicated

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Reach I

that there was still disagreement about the wording of paragraph 5(c). The Louisiana Commissioner wanted the phrase on the top of page 6, "* * * provided this quantity of water is not required to serve statutory water rights existing on the effective date of the compact * * *" deleted in its entirety. The Arkansas representative also had reservations about it because presently Arkansas had no statutory water rights as did Texas and Oklahoma. After a discussion on this matter, it was agreed that Arkansas common law right could serve as an existing State law through which a compact could be negotiated.

The main point of disagreement concerned how the water would be apportioned in periods of extremely low flows when 1,000 c.f.s. at the Louisiana State line might not be available. The method of sharing was discussed at length, with both Texas and Oklahoma representatives insisting that the vested or appropriated rights in those States be protected in low-flow situations. The Louisiana representatives wanted assurance that their State would receive 40 percent of the weekly rainfall during periods of flows below 1,000 c.f.s. General Noble asked Mr. Nelson to redraft the compact so as to clarify the method of sharing the low flows.

In the discussion on Reach III, Mr. Nelson said the problem was how the yield of the enlargement of Caddo Reservoir would be shared. Louisiana representatives stated that a 50-50 share of the increased storage would be satisfactory to that State, with rights-of-way being furnished by the individual States.

Mr. Krause indicated the cost of lands inundated in Texas is justification for a 60-40 split if Texas furnished rights-of-way in that State. It was

stressed by General Noble that the Caddo Dam enlargement could not progress until proper assurances on rights-of-way were given, and that it was important to proceed because the development moving into the areas would affect the benefit-cost ratio.

Mr. Theis stated that he now had enough information to make a proposal to Arkansas on Reach IV, but had not had time to evaluate it.

Next on the agenda, Mr. Krause read a statement signed by Mr. Deskins Wells regarding the position of Texas on the compact (see Inclosure 3).

At the close of the meeting, it was agreed that the next meeting would be held in Austin, Texas, at the Water Rights Commission facilities on Friday, 26 July 1974. Mr. Krause indicated he would arrange for a block of rooms at the Sheridan-Crest Hotel.

The meeting adjourned at 11:10 a.m.

3 Incls
As stated

DRAFT

49th MEETING
RED RIVER COMPACT COMMISSION
ADOLPHUS HOTEL
DALLAS, TEXAS

13 JUNE 1974

ATTENDANCE LIST

Members of Compact Commission

MG C. C. Noble	Federal Representative and Chairman, Corps of Engineers, USA	Vicksburg, Miss.
Americ Bryniarski	Commissioner Representative	Little Rock, Ark.
A. P. Theis	Commissioner Representative	Baton Rouge, La.
Orville B. Saunders	Commissioner	Altus, Oklahoma
H. Deskins Wells	Commissioner	Wellington, Tex.

Members of Engineering Advisory Committee

Americ Bryniarski	Arkansas Division of Soil and Water Resources	Little Rock, Ark.
A. P. Theis	Louisiana Department of Public Works	Baton Rouge, La.
Forrest Nelson	Oklahoma Water Resources Board	Oklahoma City, Okla.
Paul Wilson	Oklahoma Water Resources Board	Oklahoma City, Okla.
William Krause	Texas Water Development Board	Austin, Tex.
Ivan M. Stout	Texas Water Development Board	Austin, Tex.

Members of Legal Advisory Committee

John F. Gibson	Arkansas Division of Soil and Water Resources	Little Rock, Ark.
Homer J. Belanger	Louisiana Department of Public Works	Baton Rouge, La.
Rod Gorman	Assistant Attorney General of Texas	Houston, Tex.

Others Present

Fred H. Bayley III	Corps of Engineers, LMVD	Vicksburg, Miss.
R. Terry Coomes	Corps of Engineers, SWD	Dallas, Tex.
Lawrence N. Flanagan	Corps of Engineers, LMVD	Vicksburg, Miss.
Rodger D. Harris	Corps of Engineers, LMVD	Vicksburg, Miss.
John C. Prescott	Oklahoma Water Resources Board	Altus, Okla.
Calvin T. Watts	Red River Valley Association	Shreveport, La.

RED RIVER BASIN REACH II

A. For the purpose of apportioning the waters of Red River Basin Reach II sub-basins are established as follows:

1. Intrastate Streams-Oklahoma

The Intrastate Streams-Oklahoma sub-basin shall consist of those streams and their tributaries above existing, authorized or proposed last downstream major dam sites, wholly in Oklahoma and flowing into Red River below Denison Dam and above the Oklahoma-Arkansas stateline. These streams and their tributaries with existing, authorized or proposed last downstream major dam sites are as follows:

STREAM	SITE	LOCATION STREAM MILE
Island-Bayou	Albany	6.5
Blue River	Durant	13.0
Boggy River	Boswell	18.9
Kiamichi River	Hugo	17.6

2. Intrastate Streams-Texas

The Intrastate Streams-Texas sub-basin shall consist of those streams and their tributaries above existing, authorized or proposed last downstream major dam sites, wholly in Texas and flowing into Red River below Denison Dam and above the Texas-Arkansas stateline. These streams and their tributaries with existing, authorized or proposed last downstream major dam sites are as follows:

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*STREAM	SITE	LOCATION STREAM MILE
Shawnee Creek	Randall	2.0
Brushy Creek	Valley	5.0
Bois d' Arc Creek	Bonham	35.0
(Timber Creek	Timber Creek	2.0)
(Coffee Mill Creek	Coffee Mill	0.5)
(Sandy Creek	Crockett	2.0)
Sanders Creek	Pat Mayes	4.6
Pine Creek	Crook	21.0
Big Pine Creek	Big Pine	13.2
Pecan Bayou	Pecan Bayou	15.0
Mud Creek	Liberty Hill	8.0
Barkman Creek	Barkman	10.0

3. Interstate Streams-Oklahoma and Arkansas

The Interstate Streams-Oklahoma and Arkansas sub-basin shall consist of those streams and their tributaries above existing, authorized or proposed major dam sites, originating in Oklahoma or Arkansas and crossing the Oklahoma-Arkansas stateline one or more times before flowing into the Red River in Arkansas. These streams and their tributaries with existing, authorized or proposed last downstream major dam sites are as follows: In Oklahoma -

STREAM	SITE	LOCATION STREAM MILE
Little River	Pine Creek	145.3
Glover Creek	Lukfata	17.3
Mountain Fork River	Broken Bow	20.3

In Arkansas -

STREAM	SITE	LOCATION STREAM MILE
Little River	Millwood	16.0

4. Interstate Streams-Texas and Arkansas

The Interstate Streams-Texas and Arkansas sub-basin shall consist of those streams and their tributaries above existing, authorized or proposed major dam sites, originating in Texas and crossing the Texas-Arkansas stateline before flowing into the Red River in Arkansas. These streams and their tributaries with existing, authorized or proposed last downstream major dam sites are as follows:

STREAM	SITE	LOCATION STREAM MILE
McKinney Bayou		
(Clear Fork Creek	Waterworks	1.5)
Sulphur River	Texarkana	45.0

5. Mainstem-Red River

The Mainstem-Red River sub-basin shall consist of all those streams and their tributaries flowing into Red River below Denison Dam and above the Arkansas-Louisiana stateline not specifically included in the other four sub-basins of Reach II.

B. The waters of Reach II are hereby apportioned as follows:

1. Intrastate Streams - Oklahoma

The State of Oklahoma shall have the free and unrestricted use of the waters of the sub-basin described in Paragraph A. 1., provided that it

may use the beds and banks downstream of this sub-basin and the mainstem of Red River for the purpose of conveying water originating in this sub-basin to designated downstream diversions, subject, however. to the low flow requirements set forth in Paragraph B. 5., (a) through (f).

2. Intrastate Streams - Texas

The State of Texas shall have the free and unrestricted use of the waters of the sub-basin described in Paragraph A. 2., provided that it may use the beds and banks downstream of this sub-basin and the mainstem of Red River for the purpose of conveying water originating in this sub-basin to designated downstream diversions, subject, however, to the low flow requirements set forth in Paragraph B. 5., (a) through (f).

3. Interstate Streams - Oklahoma and Arkansas

The States of Oklahoma and Arkansas shall have the free and unrestricted use of the waters of the sub-basin described in Paragraph A. 3., subject, however, to the limitation that Oklahoma and Arkansas shall allow a quantity of water equal to 40 percent of the annual runoff originating below the last downstream major dam sites in their respective states to flow into the downstream state. Where there are no designated last downstream dam sites, the upstream state shall allow a quantity of water equal to 40 percent of the total annual runoff originating above the stateline to flow into the downstream state. Either state may use the beds and banks downstream of segments of this sub-basin and the mainstem of Red River for the purpose of conveying its share of water to designated downstream diversions, subject, however, to the low flow requirements set forth in Paragraph B. 5., (a) through (f).

4. Interstate Streams - Texas and Arkansas

The State of Texas shall have the free and unrestricted use of the waters of the sub-basin described in Paragraph A. 4., subject to the

limitation that Texas shall allow a quantity of water equal to 40 percent of the total annual runoff originating below the last downstream major dam sites in Texas to flow into Arkansas. Texas may use the beds and banks downstream of this sub-basin, including the mainstems of Sulphur River and McKinney Bayou, for the purpose of conveying water originating in this sub-basin to designated downstream diversions, subject, however, to the low flow requirements set forth in Paragraph B. 5., (a) through (f).

5. Mainstem - Red River

The States of Oklahoma, Texas and Arkansas shall have the free and unrestricted use of the waters of the sub-basin described in Paragraph A. 5., provided that:

(a) Overall accounting and allocation of flows will not be required when the flow at the Arkansas-Louisiana stateline exceeds 3,000 cfs;

(b) If the flow at the Arkansas-Louisiana stateline falls below 3,000 cfs, the States of Oklahoma, Texas and Arkansas shall allow a quantity of water up to 40 percent of the weekly runoff originating within their respective states from the mainstem of Red River to flow into Red River as undesignated flow for Louisiana as required to maintain 3,000 cfs at the Arkansas-Louisiana stateline and 40 percent of releases from the most downstream reservoirs which have not been designated or paid for for downstream uses; and

(c) If the flow at the Arkansas-Louisiana stateline falls below 1,000 cfs, the States of Oklahoma, Texas, and Arkansas shall allow a quantity of water up to 40 percent of the weekly runoff from their respective

states (provided this quantity of water is not required to serve statutory water rights existing on the effective date of the Compact) to flow into the Mainstem-Red River as designated flow for Louisiana up to 1,000 cfs.

(d) The States of Oklahoma, Texas, and Arkansas may pass any of their water or reserve ownership of such water for designated downstream diversions.

(e) Oklahoma and Texas may pass any of their share of water or reserve ownership of such water for designated downstream diversions.

(f) Flood water and water used in power generation passed from Reach I into Reach II shall be shared by the States of Oklahoma and Texas on a contributing share basis and may be designated by either state for downstream diversions.

C. No state guarantees to maintain a minimum low flow to a downstream state, however, the States of Oklahoma, Texas, and Arkansas mutually agree to regulate under their respective state laws the diversion of runoff originating in the Mainstem-Red River sub-basin as designated in Paragraph A. 5., and the diversion of designated water passed from upstream sub-basins or Reach I, in compliance with the provisions of Paragraph B. 5.

STATEMENT
Regarding the Position of Texas
on the
Red River Compact

Public Law 346, 84th Congress, First Session, granting the consent of Congress to the states of Texas, Oklahoma, Arkansas and Louisiana to negotiate and enter into a compact providing for the apportionment of waters of the Red River and its tributaries was approved by the President of the United States on August 11, 1955. The first meeting, for the purpose of organization was held March 6 and 7, 1956.

REACH I

Reach I consists of the Red River and its tributaries from New Mexico-Texas State Boundary to Denison Dam. Negotiations associated with this segment of the basin are in agreement with the exception of the North Fork and Sweetwater Creek portion. In my opinion, the State of Oklahoma is ready to accept a 60-40 percent apportionment of the flows in the North Fork as recommended by the Engineer Advisors and as offered by Texas, but are reluctant to do so without agreement by the Altus-Luggert Irrigation District. District representatives, led by Mr. Bob Harbison, Attorney for the District, are apparently firm in their belief that litigation is the only solution to apportionment.

REACH II

Reach II consists of the Red River and its tributaries between Denison Dam and a point where the Red River crosses the Arkansas-Louisiana

boundary. Negotiations associated with this portion of the Red River are virtually complete. The recommendations of the Engineer Advisors have been approved by the Commission, with minor exceptions by Arkansas and Louisiana, and have been turned over to the Legal Advisors for final drafting.

REACH III

Reach III pertains primarily to the Cypress River and tributaries in Texas which flows through Caddo Lake into Louisiana as a tributary to the Red River. Negotiations associated with this reach are virtually complete with the exception of problems at Caddo Lake. The raising of the Caddo Dam as planned by the Corps of Engineers will inundate a large land area in Texas, the expense of which must be justified. The State of Texas is, however, willing to continue negotiations with Louisiana on this reach of the river based on the 60-40 percent apportionment recommended by the Engineers Advisors.

REACH IV & V

These reaches of the Red River Basin are the responsibilities of Arkansas and Louisiana and negotiations thereof are between those two states. The State of Texas does however, insist that such negotiations be based on quantities of water within the mainstem Red River and Texas tributaries thereto as specified in the recommendations by the Engineer Advisors for upstream reaches.

With regards to Reach I, the disagreements between Texas and Oklahoma, associated with this small portion of the huge Red River Basin, should not be considered a major factor within the overall compact. When problems associated with apportionment of the major reaches are resolved, Texas feels she and Oklahoma can reach agreement regarding the North Fork and Sweetwater Creek portion, on one of three possible solutions as follows:

1. Resolve the problem by mutual agreement.
2. Mutual agreement that this small portion be excluded from the Compact.
3. Take the problem to the Courts for settlement with both states urging an early decision.

The Red River Basin, and particularly Reach II, contains Texas tributaries which play a major role in future Texas plans. On November 27, 1973 Governor Dolph Briscoe advised the Texas Water Resource Conservation and Development Task Force that the state's greatest need was to get more water to dry West Texas. He also said that the needs could be met with only a small percentage of surplus waters from the Mississippi or one of its tributaries and that solution to this problem was one of the goals of his administration.

The "Water Task Force" is moving toward the goal established by Governor Briscoe, and has recommended immediate action on a short range water plan including possible water importation. The governor has approved

and adopted these recommendations and has designated the Texas Water Development Board as the primary responsible agency for planning, design and construction of the required facilities with or without Federal financial support.

Short range plans include Mackenzie reservoir (completion date 1974) and Big Pine reservoir (completion date 1979) in the Red River Basin, Cooper reservoir (completion date 1979) in the Sulphur River Basin, and Cherokee Trail reservoir (completion date 1976) in the Cypress Creek Basin. The State of Texas can not, and will not delay future planning, design and construction of facilities associated with the development of her own resources pending the finalization of a Compact for the Red River.

In May 1974, Governor Edwin Edwards of Louisiana declared that he had changed his mind about the proposal to take water from the Mississippi to West Texas. He is now in favor of exportation plans. This is welcome news to Texas.

The Texas Water Rights Commission, as trustee of the State's water, is fully aware that actions in granting permission to use the State's waters have a vital influence on the overall development of river basins and watersheds. The Commission has therefore established criteria which are used in evaluation of applications for permits to construct water supply projects, whether proposed by individuals, municipalities, districts, or State and Federal agencies. The Commission will continue to fulfill its obligations and responsibilities in review and approval of all

applications and plans for projects involving the impoundment, diversion and beneficial use of the waters of the State of Texas under existing law.

As the Red River Compact Commissioner for Texas, I will do all within my power to finalize negotiations and to assure preparation of a Compact which will equitably apportion the waters of the Red River and tributaries for mutual benefit of each state involved, and I pledge my efforts toward the goals and views established by the Governor of Texas and of Louisiana to provide a means whereby those declared goals can become a reality.

H. Deskins Wells,
Red River Compact Commissioner
for Texas

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13 Sep 74

MINUTES OF THE 50TH MEETING
RED RIVER COMPACT COMMISSION
Stephen F. Austin Building
Austin, Texas
26 July 1974

The 50th meeting of the Red River Compact Commission convened at 9 a.m., 26 July 1974, at the Stephen F. Austin Building, Austin, Texas. An attendance list is attached (Incl 1). General Noble opened the proceedings by expressing his appreciation to the Texas members for hosting the meeting.

The minutes of the 49th meeting were read and approved.

Next, Mr. Tim Brown, General Counselor for the Texas Water Rights Commission, presented a history of Texas Law of Water Rights. A question and answer period followed.

Mr. Forest Nelson indicated that no progress had been made in discussions between Texas and Oklahoma on Reach I. He reiterated the Engineering Advisory Committee's recommendations to the Commission for a 60-40 split in the water. A discussion followed on how litigation could be instituted and what the outcome might be. General Noble, in concluding the discussion on Reach I, indicated his desire that the Compact negotiations proceed without litigation unless the point is reached where the North Fork is the last item remaining to be compacted. He called for a continued effort by the Oklahoma and Texas Commissioners to resolve the matter between themselves.

General Noble continued the meeting by requesting a report on the rewritten portion of the Engineering Advisory Committee's recommendations for Reach II. Mr. Nelson stated that the wording of Paragraph B.5(c) had been changed to delete that portion in parentheses, and that Paragraph B.5(e) had been deleted since it was considered similar to Paragraph B.5(d) and unnecessary. Mr. Cresap then presented a recommended change to Section C (see Incl 2). After a lengthy discussion, it was agreed that the report would be accepted with the exception of Section C, which would be further reviewed by members of the Engineering Advisory Committee.

Mr. Forest Nelson stated that the States of Louisiana and Texas were still in the process of negotiating the division of yields from the enlargement of Caddo Reservoir in Reach III. After discussions concerning the background of the present negotiations and the difference between paying for storage and having water rights, it was concluded that a better basis for negotiations would be provided if the Corps of Engineers would make a presentation concerning facts about Caddo Reservoir including laws and regulations governing its construction. Mr. Bayley was to make the necessary arrangements.

In the discussion on Reach IV, Mr. Theis stated that Louisiana had not prepared a counter proposal to the October 1973 proposal submitted by Arkansas. General Noble encouraged Mr. Theis to develop a schedule by which to review the Arkansas proposal and submit his counter proposal.

Commissioner Saxton stated that the State of Arkansas has a study underway which will develop economic projections which might be of use to Louisiana

in developing their counter proposal. He indicated that this should be completed by the end of this year.

Two places were suggested for the next Compact Commission meeting: El Paso, Texas, and Shreveport, Louisiana. Mr. Krause pointed out that the Texas Interstate Compact Commission Conference would be in El Paso on 21-22 Nov and that the Compact meeting could be held in conjunction with that conference. No decision was made as to the place and time.

In conclusion, the Compact Commissioners presented a plaque to General Noble in recognition of his service as Chairman of the Red River Compact Commission.

The meeting was adjourned.

50TH MEETING
RED RIVER COMPACT COMMISSION
Stephen F. Austin Building
Austin, Texas
26 July 1974

ATTENDANCE LIST

Members of Compact Commission

MG C. C. Noble	Federal Representative and Chairman, Corps of Engineers, USA	Vicksburg, Miss.
John P. Saxton	Commissioner	Little Rock, Ark.
Daniel V. Cresap	Commissioner	Baton Rouge, La.
Orville B. Saunders	Commissioner	Altus, Okla.
William Krause	Commissioner Representative	Austin, Tex.

Members of Engineering Advisory Committee

Americ Bryniarski	Arkansas Division of Soil and Water Resources	Little Rock, Ark.
A. P. Theis	Louisiana Department of Public Works	Baton Rouge, La.
Richard Bennett	Louisiana Department of Public Works	Baton Rouge, La.
Forrest Nelson	Oklahoma Water Resources Board	Oklahoma City, Okla.
Ivan M. Stout	Texas Water Development Board	Austin, Tex.

Members of Legal Advisory Committee

John F. Gibson	Arkansas Division of Soil and Water Resources	Little Rock, Ark.
Homer J. Belanger	Louisiana Department of Public Works	Baton Rouge, La.
Rod Gorman	Assistant Attorney General of Texas	Houston, Tex.

Others Present

Fred H. Bayley III	Corps of Engineers, LMVD	Vicksburg, Miss.
Lawrence N. Flanagan	Corps of Engineers, LMVD	Vicksburg, Miss.
John C. Prescott	Oklahoma Water Resources Board	Altus, Okla.

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State of Louisiana
DEPARTMENT OF PUBLIC WORKS
P. O. BOX 44155, CAPITOL STATION
BATON ROUGE, LOUISIANA 70804

ROY AGUILLARD
DIRECTOR

BOARD OF PUBLIC WORKS
GEORGE CHANEY, CHAIRMAN
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P. P. VERRETT, SR.
RICHARD P. GIBSON
ROLAND CARTER

June 11, 1974

RECOMMENDED REVISIONS BY LOUISIANA TO
RED RIVER BASIN REACH II

B-5 Mainstem - Red River

(c) Delete the part of this paragraph contained in parenthesis. Since Louisiana is agreeing to limit the portion of the water of the Red River Basin to a very minimum amount with no assurance that even this amount which is only 40% of the weekly runoff will enter Louisiana. It would not be possible for Louisiana to get approval from our legislators for an agreement which in effect could provide a zero flow.

C No state guarantees to maintain a minimum low flow to a downstream state, however, the state of Oklahoma, Texas, and Arkansas mutually agrees to the extent that the laws of such states permit to prevent any withdrawl or diversion which will have the effect of diminishing the amount of water apportioned under Section 5-B Mainstem Red River

Encl 2

DRAFT
Flanagan/mda/385
April 1975

MINUTES OF THE 51ST MEETING
RED RIVER COMPACT COMMISSION
Rodeway Inn Motel
Arlington, Texas
9 April 1975

The 51st meeting of the Red River Compact Commission convened at 9:00 a.m., 9 April 1975, at the Rodeway Inn Motel in Arlington, Texas. An attendance list is inclosed (Incl 1). General Koisch opened the meeting with an introduction of those present.

Mr. Jack Roy of the New Orleans District, Corps of Engineers, presented a statement of facts (Incl 2) about Caddo Lake. The presentation included technical data such as yields, acres inundated in the States of Texas and Louisiana by the existing and an enlarged lake, a physical description of the original and existing dam, a summary of laws and regulations governing construction, and a general review of the lake's history.

The minutes of the 50th meeting were read and approved.

Since this was the first meeting for General Koisch and Judge Dent, Mr. Forrest Nelson gave a detailed briefing on the history and present status of negotiations on each of the reaches. He also disclosed that in the last meeting of the Engineering Advisory Committee, it was found that changes proposed in paragraph c by the State of Louisiana would create additional problems with the wording of paragraph B.5(c) where the phrase in parenthesis "provided this quantity of water is not required to serve statutory water rights existing on the effective date of the Compact" had been deleted at the last Compact meeting.

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Incl 1

In the discussion on Reach I Mr. Saunders indicated he would not accept a 60-40 split on the north fork as proposed for other portions of the reach but would like to discuss this further with Judge Dent. General Koisch pointed out the need to come up with an agreement acceptable to both state legislatures and suggested additional meetings between the states prior to the next Compact Commission meeting.

Mr. Cresap outlined the problems Louisiana was encountering as the most downstream state in obtaining an equitable apportionment of the water particularly in connection with the appropriative system of Texas and Oklahoma. He indicated in regard to wording in the draft compact on Reach II there could be no agreement unless there were assurances that upstream states would do nothing to stop low flows which Louisiana was to receive under the compact. He emphasized that the State of Louisiana never asked for a guaranteed low flow.

After a general discussion of the provision of the draft agreement on Reach II, General Koisch stated that he thought some type of protective clause for statutory rights would be needed before state legislatures would approve the compact. He said a flexible protective clause would allow the Commission as an operating body to meet and solve individual problems particularly in a crisis situation. Mr. Gorman noted that a flexible protective clause could be written into the compact and not necessarily placed in the Reach II portion of the agreement.

Judge Dent indicated that at this time water in the Red River was not over appropriated but the longer the agreement is delayed the more difficult

it will be to make a compact. He compared the Sabine River Compact to the Red River Compact in that the permit system wording there does protect low flows for Louisiana by the issuance of permits conditional to low flow requirement.

After further detailed discussion of Reach II, General Koisch asked the Engineering Advisory Committee to reconsider problems in this reach. It was pointed out that perhaps the approach had been too narrow in that flows from Denison were not being considered in solving the low flow problem.

In discussions on Reach III it was indicated by Mr. Cresap that enough information is now available and hopefully an agreement can be reached after Louisiana and Texas have had time to make an evaluation.

Forrest Nelson recommended that the Vicksburg District, Corps of Engineers, make a presentation on Reach IV to the Engineering Advisory Committee similar to that made by Jack Roy of the New Orleans District on Caddo Lake. It was agreed that this would be done.

In closing General Koisch stated his belief in the importance of arriving at a compact and expressed his desire that a draft compact be prepared for consideration of the Commissioners at the next meeting with the thought that a number of smaller constructive meetings could take place before that time. It was agreed that the next Compact Commission meeting would be held in September 1975.

The meeting was adjourned.

51ST MEETING
RED RIVER COMPACT COMMISSION
Rodeway Inn Motel
Arlington, Texas
9 April 1975

ATTENDANCE LIST

Members of Compact Commission

GEN F. P. Koisch	Federal Representative and Chairman, Corps of Engineers, USA	Vicksburg, Miss.
John P. Saxton	Commissioner	Little Rock, Ark.
Daniel V. Cresap	Commissioner	Baton Rouge, La.
Orville B. Saunders	Commissioner	Altus, Okla.
Ortha F. Dent	Commissioner	Austin, Tex.

Members of Engineering Advisory Committee

Americ Bryniarski	Arkansas Division of Soil and Water Resources	Little Rock, Ark.
A. P. Theis	Louisiana Department of Public Works	Baton Rouge, La.
Richard Bennett	Louisiana Department of Public Works	Baton Rouge, La.
Forrest Nelson	Oklahoma Water Resources Board	Oklahoma City, Okla.
Ivan M. Stout	Texas Water Development Board	Austin, Tex.
Paul R. Wilson	Oklahoma Water Resources Board	Oklahoma City, Okla.
Robert M. Whitenton	Texas Water Rights Commission	Austin, Tex.

Members of Legal Advisory Committee

Homer J. Belanger	Louisiana Department of Public Works	Baton Rouge, La.
Rod Gorman	Assistant Attorney General of Texas	Houston, Tex.

Others Present

BG C. I. McGinnis	Corps of Engineers, SWD	Dallas, Tex.
Fred H. Bayley III	Corps of Engineers, LMVD	Vicksburg, Miss.
Lawrence N. Flanagan	Corps of Engineers, LMVD	Vicksburg, Miss.
Rodger Harris	Corps of Engineees, LMVD	Vicksburg, Miss.
Terry Coomes	Corps of Engineers, SWD	Dallas, Tex.
Jack Roy	Corps of Engineers, NOD	New Orleans, La.
Calvin Watts	Red River Valley Association	Shreveport, La.

CADDO LAKE

9 APRIL 1975

BEFORE DISCUSSING MY PLANS FOR THE ENLARGEMENT OF CADDO LAKE AS IT EXISTS TODAY, I THINK IT WOULD BE OF INTEREST TO YOU TO REVIEW A LITTLE OF THE HISTORY OF THIS LAKE, WHICH IS LOCATED AT THE HEAD OF TWELVEMILE BAYOU IN NORTHWEST LOUISIANA AND NORTHEAST TEXAS.

CADDO LAKE, KNOWN IN EARLY REPORTS AS "FERRY" OR "FAIRY" LAKE, IS A NATURAL LAKE, AND EVEN BEFORE THE CONSTRUCTION OF A DAM, AN IMPORTANT LINK IN THE WATERWAY CONNECTING JEFFERSON, TEXAS, WITH SHREVEPORT, LOUISIANA. THE ORIGINAL DAM, LOCATED IN CADDO PARISH ABOUT 19 MILES NORTHWEST OF THIS CITY, AT THE FOOT OF THE NATURAL LAKE, WAS AUTHORIZED IN 1910 AS A FEATURE OF THE CYPRESS BAYOU AND WATERWAY BETWEEN JEFFERSON, TEXAS, AND SHREVEPORT, LOUISIANA. THE DAM WAS COMPLETED IN DECEMBER OF 1914 FOR THE PURPOSE OF MAINTAINING SHALLOW DRAFT NAVIGATION ABOVE THE DAM, THROUGH CYPRESS BAYOU BETWEEN HORRINGSPORT, LOUISIANA, AND JEFFERSON, TEXAS. THE COST OF THE DAM TO THE FEDERAL GOVERNMENT WAS $100,600. AS ORIGINALLY BUILT, THE DAM CONSISTED OF CONCRETE WALLS TO ABOUT ELEVATION 170.5 FT M.S.L. SEPARATED BY A 2,963-FOOT CONCRETE FIXED TYPE SPILLWAY AT ABOUT ELEVATION 168.5.

IN JUNE 1922, A SECTION OF THE DAM, ABOUT 1,600 FEET FROM THE SOUTH END, FAILED FROM SEEPAGE AND UNDERMINING. AN EARTH DIKE WAS CONSTRUCTED ABOVE THE BREAK BY LOCAL INTERESTS TO PRESERVE THE WATER LEVELS. IN 1923 A PERMANENT CLOSURE WAS MADE. THE DAM SLOWLY DETERIORATED UNTIL IN 1964 SUBSTANTIAL LEAKAGE OCCURRED AND THE DAM WAS IN DANGER OF FAILURE.

ALTHOUGH USE OF THE WATERWAY FOR COMMERCIAL TRAFFIC HAD LONG CEASED AND IT WAS NO LONGER MAINTAINED FOR NAVIGATION, THE LAKE HAD BECOME VERY IMPORTANT TO THE ECONOMY OF THE AREA BECAUSE OF ITS USE FOR WATER SUPPLY, RECREATION, AND OIL WELL OPERATIONS. REPLACEMENT OF THE DAM WAS AUTHORIZED BY THE FLOOD CONTROL ACT OF 17 OCTOBER 1965, PL 89-298. FEDERAL PARTICIPATION WAS LIMITED SOLELY TO THE REPLACEMENT OF THE DAM AND NON-FEDERAL INTERESTS RETAINED ALL PRIOR RIGHTS TO WATERS IN THE LAKE. CONSTRUCTION OF THE REPLACEMENT DAM BEGAN IN AUGUST 1968 AND WAS COMPLETED ON 18 JUNE 1971. THE DAM CONSISTS OF 2,400 LINEAR FEET OF CONCRETE WALL, OF WHICH 860 FEET IS AT A CREST OF 168.5 FT M.S.L. AND THE REMAINING 1,540 FEET AT A CREST OF 170.5 FT M.S.L., AND ABOUT 1,200 LINEAR FEET OF EARTH EMBANKMENT AT ELEVATION 176.0 FT M.S.L., EXTENDING FROM THE HILLS SOUTH OF CADDO LAKE TO THE CONCRETE WALLS. BELOW THE CONCRETE WALL, COLLECTING DITCHES CHANNEL LOW FLOWS TO AND OVER A 100-FOOT-WIDE CONCRETE OGEE WEIR AT ELEVATION 160.5 FT M.S.L. AND INTO A FINAL STILLING BASIN. THE DAM IS SO DESIGNED AS TO SIMPLIFY MODIFICATION THAT WILL PERMIT RAISING THE CONTROLLED LAKE LEVEL TO A MAXIMUM OF 4 FEET TO PROVIDE ADDITIONAL WATER SUPPLY STORAGE IN THE LAKE. THE EXISTING POOL COVERS AN AREA OF 27,000 ACRES.

NO FEDERAL GOVERNMENT REAL PROPERTY INTEREST EXISTS IN CADDO LAKE OR THE ADJACENT LAND AREAS. THE AUTHORIZING ACT REQUIRED THAT THE CADDO LEVEE DISTRICT FURNISH THE LANDS AND RIGHTS-OF-WAY NECESSARY FOR CONSTRUCTION OF THE REPLACEMENT DAM AND ASSUME SUBSEQUENT OPERATION AND MAINTENANCE.

THE AREA ADJACENT TO THE DAM, OWNED BY THE CADDO LEVEE DISTRICT, IS OPEN TO THE PUBLIC. ADDITIONALLY, THE CADDO PARISH POLICE JURY HAS CREATED A 42 ACRE PUBLIC PARK ON THE LEFT DESCENDING BANK OF THE LAKE ABOVE 1 MILE UPSTREAM OF THE DAM. THE PARK HAS A 3 LANE LAUNCH RAMP WITH A PARKING LOT FOR 40 CARS AND TRAILERS. EXISTING, OR PLANNED FOR THE NEAR FUTURE, ARE MANY RECREATION FACILITIES, INCLUDING A FISHING PIER, CAMP SITES, PICNIC TABLES, FIRE GRILLS, A BASEBALL DIAMOND, AND OPEN PLAYING FIELDS.

THE FEASIBILITY OF RAISING THE REPLACEMENT DAM 4 FEET FOR WATER SUPPLY AND OTHER PURPOSES WAS INVESTIGATED IN THE COMPREHENSIVE BASIN STUDY OF RED RIVER BELOW DENISON DAM. THESE STUDIES HAVE INDICATED THAT RECREATIONAL AND WATER SUPPLY NEEDS IN THE AREA WILL SUPPORT THE ENLARGEMENT OF CADDO LAKE AND THAT SUCH ENLARGEMENT IS FEASIBLE AND ECONOMICALLY JUSTIFIED. THE REPORT ON THIS STUDY, COMPLETED IN 1968, INCLUDED IN ITS "EARLY-ACTION" PROGRAM A PLAN FOR MODIFICATION OF CADDO DAM TO MEET THESE DEMANDS. THE PLAN PROVIDES FOR A 4-FOOT RAISING OF THE PRESENT 2,400-FOOT LONG UNCONTROLLED SPILLWAY DAM, TO ELEVATION 172.5 FT M.S.L. POOL LEVELS ABOVE THAT ELEVATION WOULD INUNDATE MUCH OF THE EXTENSIVE PRIVATE AND COMMERCIAL DEVELOPMENT ON THE SHORES OF THE LAKE. STORAGE IN THE LAKE AT THE NEW ELEVATION WOULD BE INCREASED BY 183,000 ACRE-FEET, AND THE SURFACE AREA WOULD COVER 35,600 ACRES. A DEPENDABLE YIELD OF 120,000 ACRE-FEET PER YEAR, OR 107 MILLION GALLONS PER DAY, COULD BE REALIZED FROM THE ENLARGED LAKE.

CONSTRUCTION OF ONE BRIDGE AND MODIFICATION OF ONE BRIDGE AND ABOUT 450 OIL WELL STRUCTURES IN THE LAKE WOULD BE REQUIRED.

THE PROJECT WOULD INCLUDE PROVISIONS FOR DEVELOPING TWO PUBLIC-USE SITES ON THE SHORES OF THE LAKE TO SATISFY THE FUTURE RECREATION NEEDS. A FISHING PLATFORM AND PARKING AREA AT THE OUTLET WORKS ALSO WOULD BE INCLUDED.

ENLARGEMENT OF THE EXISTING LAKE WOULD RESULT IN THE INUNDATION AND DESTRUCTION OF VALUABLE WILDLIFE HABITAT AND THE PLAN INCLUDED MEASURES TO MITIGATE THE RESULTING LOSS. A TOTAL OF 990 ACRES WOULD BE ACQUIRED, IN TWO SITES, AS PARTS OF TWO GREENTREE RESERVOIR DEVELOPMENTS. THE TWO DEVELOPMENTS WOULD PROVIDE FOR MITIGATION OF PROJECT-OCCASIONED LOSSES IN CONNECTION WITH THE ENLARGEMENT OF CADDO LAKE, THE TITUS COUNTY RESERVOIR, AND THE NAVIGATION AND BANK STABILIZATION PROJECT. THE FIRST DEVELOPMENT WOULD BE IN THE SULPHUR RIVER BOTTOM LANDS IN TEXAS JUST BELOW THE EXISTING TEXARKANA DAM. THIS DEVELOPMENT WOULD INCLUDE A TOTAL OF 2,000 ACRES, OF WHICH 920 ACRES WOULD BE ACQUIRED TO MITIGATE THE LOSSES IN TEXAS ATTRIBUTABLE TO THE ENLARGEMENT OF CADDO LAKE. THE SECOND DEVELOPMENT WOULD BE LOCATED AS AN EXTENSION OF THE SODA LAKE GAME MANAGEMENT AREA, IMMEDIATELY DOWNSTREAM FROM THE CADDO DAM. THIS DEVELOPMENT OF 530 ACRES WOULD INCLUDE 70 ACRES FOR MITIGATION OF LOSSES IN LOUISIANA ATTRIBUTABLE TO THE ENLARGEMENT OF CADDO LAKE. THE TWO DEVELOPMENTS ARE PROXIMATE TO THE AREAS IN WHICH THE PROJECT-OCCASIONED LOSSES COULD OCCUR, AND WOULD PROVIDE A HIGHER DEGREE OF MITIGATION AT A LOWER COST THAN WOULD THREE INDEPENDENT DEVELOPMENTS.

THE TOTAL LANDS REQUIRED FOR THE PROJECT AMOUNT TO 21,590 ACRES, INCLUDING 600 ACRES FOR RECREATIONAL DEVELOPMENT, AND THE AFOREMENTIONED 990 ACRES FOR MITIGATION. THESE FIGURES ARE SUBJECT TO CHANGE, OF COURSE, AT THE TIME MORE DETAILED STUDIES ARE MADE. WE KNOW, FOR EXAMPLE, THAT PART OF THE TITUS SITE IS NOW OCCUPIED BY THE FRANKLIN COUNTY RESERVOIR (LAKE CYPRESS SPRINGS).

THE TOTAL FIRST COST OF CONSTRUCTION, ACCORDING TO REPORT ESTIMATES WHICH WERE BASED ON 1968 PRICE LEVELS, WAS $10,500,000. THE ANNUAL CHARGES, BASED ON A 3 1/4 PERCENT INTEREST RATE, AMOUNTED TO $492,500.

THE PROJECT WAS ESTIMATED TO PROVIDE ANNUAL BENEFITS OF $714,300, CONSISTING OF $339,000 FOR WATER SUPPLY, $240,000 FOR RECREATION, AND $135,000 FOR FISH AND WILDLIFE ENHANCEMENT.

COMPARISON OF THE $714,300 BENEFITS WITH THE ANNUAL CHARGES OF $492,500 INDICATES A BENEFIT-COST RATIO OF 1.5.

FOR PLANNING PURPOSES THE ESTIMATED YIELD OF 120,000 ACRE-FEET PER YEAR, WAS DISTRIBUTED BETWEEN THE STATES OF TEXAS AND LOUISIANA ON THE BASIS OF ONE-THIRD TO TEXAS AND TWO-THIRDS TO LOUISIANA IN ACCORDANCE WITH THE THEN CURRENT DRAFT OF THE RED RIVER COMPACT (DATED FEBRUARY 21 1966). AS NOTED IN THE REPORT, FINAL DETERMINATION OF THE DISTRIBUTION OF WATER BETWEEN THE TWO STATES WILL DEPEND UPON THE TERMS OF THE COMPACT WHEN ACCEPTED BY THE FOUR STATES INVOLVED AND THE US CONGRESS; AND THE EXISTENCE OF SPECIFIC PROSPECTIVE PURCHASERS.

THE INSTITUTIONAL ARRANGEMENTS UNDER WHICH ENLARGEMENT OF CADDO LAKE MIGHT BE ACCOMPLISHED, WERE NOT DEVELOPED IN THE COMPREHENSIVE REPORT. SUCH INSTITUTIONAL ARRANGEMENTS AS WOULD BE SUITABLE IN THIS CASE WOULD BE THE SUBJECT OF AN AUTHORIZING DOCUMENT TO SUPPLEMENT THE COMPREHENSIVE REPORT. WHILE THE WATER SUPPLY AND RECREATION PURPOSES DO NOT, UNDER CURRENT POLICY, PROVIDE FOR THE ENLARGEMENT OF CADDO LAKE AS A FEDERAL PROJECT, THE INCLUSION OF NAVIGATION AS A PROJECT PURPOSE, IN THE AUTHORIZED "RED RIVER WATERWAY" PROJECT OPENS THE WAY TO FEDERAL CONSTRUCTION OF THE PROJECT UNDER THE WATER SUPPLY ACT OF 1958, PL 85-500.

UNDER THIS ACT, THE PRIMARY RESPONSIBILITY OF THE STATE AND LOCAL INTERESTS IN DEVELOPING WATER SUPPLIES FOR DOMESTIC, MUNICIPAL, INDUSTRIAL, AND OTHER PURPOSES IS RECOGNIZED, AND THE FEDERAL GOVERNMENT IS AUTHORIZED TO PARTICIPATE, IN COOPERATION WITH STATE AND LOCAL INTERESTS, IN THE DEVELOPMENT OF SUCH WATER SUPPLIES ON CONNECTION WITH THE CONSTRUCTION OF FEDERAL NAVIGATION, FLOOD CONTROL, IRRIGATION, OR MULTIPLE PURPOSE PROJECTS. THIS MEANS THAT ONCE A FEDERAL INTEREST IN A PROJECT IS ESTABLISHED, STORAGE FOR THE PURPOSE OF WATER SUPPLY CAN BE ADDED TO THE PROJECT PROVIDED THAT BEFORE CONSTRUCTION, STATE OR LOCAL INTERESTS AGREE TO PAY FOR THE COST OF PROVIDING THE WATER SUPPLY STORAGE.

THE RIGHT TO USE STORED WATER IS OBTAINED BY THE WATER USERS. RESPONSIBLE STATE AGENCIES WILL RESOLVE CONFLICTS AMONG WATER USERS OVER THE RIGHT TO USE WATER STORED FOR WATER SUPPLY PURPOSES. THE LOCAL INTERESTS CONTRACTING FOR THE USE OF WATER SUPPLY STORAGE ARE REQUIRED TO HOLD THE GOVERNMENT FREE FROM LIABILITY FOR CLAIMS FOR DAMAGES MADE AS A RESULT OF THE STORAGE AND WITHDRAWAL OF WATER BY THE USER.

FINALLY, A FEW WORDS ABOUT THE INCLUSION RECREATION AS A PURPOSE. THE FEDERAL WATER PROJECTS RECREATION ACT OF 1965, PL 89-72, OUTLINES THE RESPONSIBILITIES OF LOCAL INTEREST IN THE DEVELOPMENT OF RECREATION IN A MULTIPLE PURPOSE PROJECT. THE LAW STATES THAT IF, BEFORE AUTHORIZATION OF A PROJECT, NON-FEDERAL PUBLIC BODIES INDICATE THEIR INTEREST IN WRITING TO AGREE TO ADMINISTER PROJECT LAND AND WATER AREAS, LOCAL INTERESTS SHALL BEAR NOT LESS THAN ONE-HALF THE SEPARABLE COSTS OF THE PROJECT ALLOCATED TO RECREATION AND ALL THE COST OF OPERATION, MAINTENANCE AND REPLACEMENT INCURRED THEREFOR. NOT MORE THAN ONE-HALF THE SEPARABLE COSTS AND ALL THE JOINT COSTS OF THE PROJECT ALLOCATED TO RECREATION SHALL BE BORNE BY THE UNITED STATES AND BE NON-REIMBURSABLE. THE NON-FEDERAL SHARE OF THE COST MAY BE PAID IN CASH OR EQUIVALENT LANDS AND FACILITIES BEFORE COMPLETION OF THE PROJECT OR REPAYMENT WITH INTEREST MAY BE MADE OVER A 50-YEAR PERIOD AFTER THE FIRST USE OF THE PROJECT. ENTRANCE OR USER FEES MAY BE USED TO DEFRAY THESE COSTS.

THIS CONCLUDES MY REMARKS. I WILL BE HAPPY TO ENTERTAIN ANY QUESTIONS YOU MAY HAVE AT THIS TIME.

CADDO LAKE
ENLARGEMENT FOR WATER SUPPLY*

Dam Location	32°42'23"N - 93°55'06"W
Drainage Area	2,744[1] Sq.Mi.
Top of Dam Elev. above m.s.l.	172.5 Ft.
Water Supply Pool	
Elev. above m.s.l.	172.5 Ft.
Area	35,600 Acres
Storage in Water Supply Pool	183,000 Ac-Ft.
Storage to Top of Water Supply Pool	252,250 Ac-Ft.
Estimated Water Supply Yield	120,000 Ac-Ft/yr
Critical Drawdown Period	Apr 1956 to Feb 1957
Minimum Pool	
Elev. above m.s.l.	166.0 Ft.
Area	20,700 Acres
Storage in Pool	69,250 Ac-Ft.
Spillway	
Type	Broad-Crested Weir
Length	2,400 Ft.
Crest Elev. above m.s.l.	172.5 Ft.

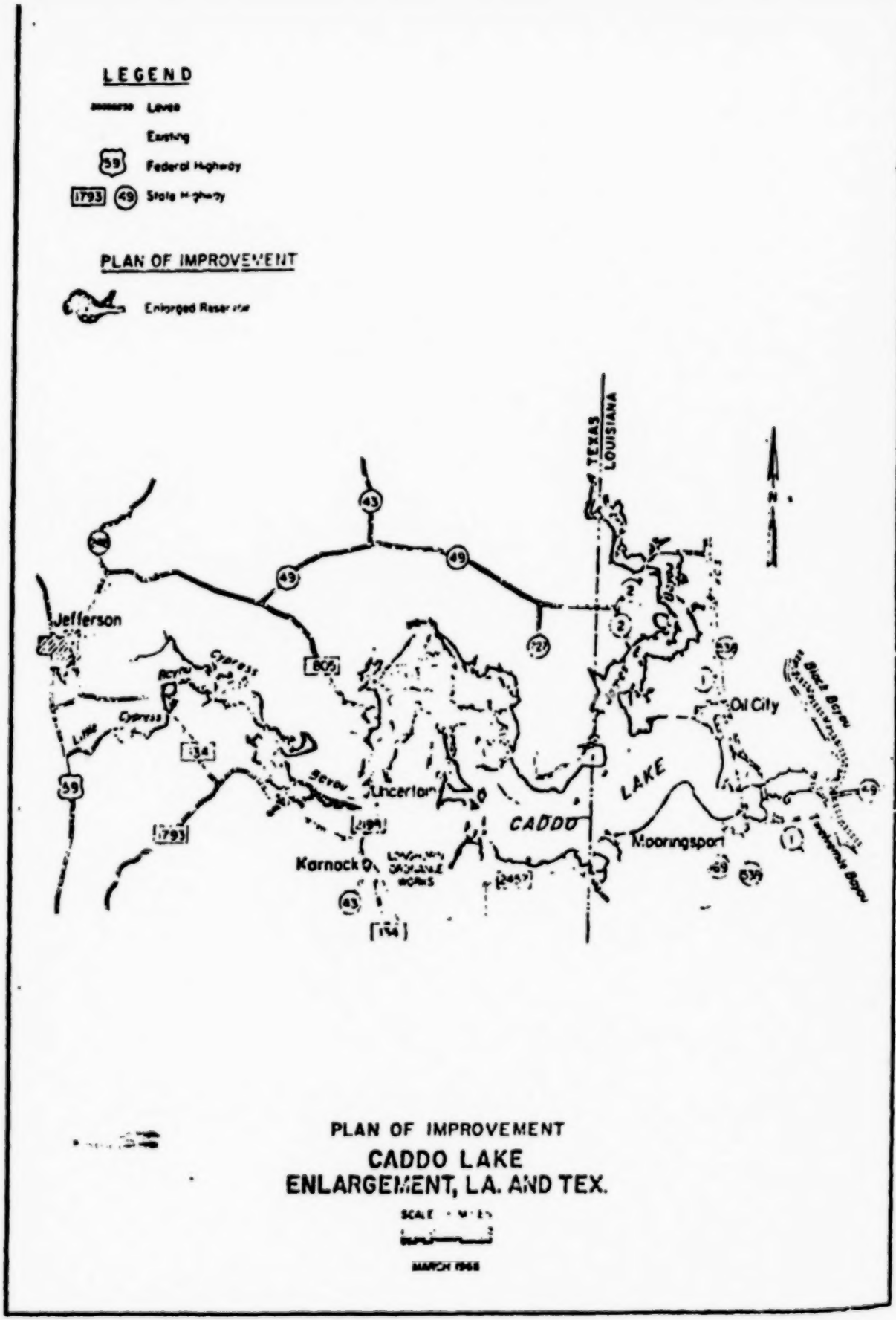
(1) 888 sq. mi. uncontrolled, 1,856 sq. mi. controlled by Lake O' The Pines, Marshall, and Black Cypress Reservoirs

COMPARISON OF LAKE AREAS

Surface area, acres

Caddo Lake	Texas	Louisiana	Total
Existing (Elev 168.5)	13,100	13,900	27,000
Enlarged (Elev 172.5)	20,900	14,700	35,600

*Based on plan developed in Comprehensive Basin Study, Red River below Denison Dam, Arkansas, Louisiana, Oklahoma, and Texas, June 1968.


LEGEND
Levee
Existing
Federal Highway
State Highway
PLAN OF IMPROVEMENT
Enlarged Reservoir
TEXAS
LOUISIANA
N
Jefferson
Cypress
Little Cypress
Bayou
Uncertain
Karnack
CADDO
LAKE
Oil City
Mooringsport
Black Bayou
Twelvemile Bayou
PLAN OF IMPROVEMENT
CADDO LAKE
ENLARGEMENT, LA. AND TEX.
MARCH 1968

FN

DEPARTMENT OF THE ARMY
LOWER MISSISSIPPI VALLEY DIVISION, CORPS OF ENGINEERS
VICKSBURG, MISSISSIPPI 39180

REPLY TO ATTENTION OF: LMVPD-N

8 December 1975

Mr. Orville B. Saunders
Red River Compact
Commissioner for Oklahoma
Drawer V
Altus, Oklahoma 73521

Dear Mr. Saunders:

A draft of the proposed minutes for the 52nd meeting of the Red River Compact Commission (Incl 1) is furnished for your review. Please send me any suggested changes prior to our next meeting.

At the 6 November 1975 meeting of the Red River Compact Commission, it was agreed that I would prepare an official draft Compact as the first step in completing Compact negotiations within the next year. Details of my timetable for accomplishing this are reflected in the draft minutes of the meeting.

Four copies of the draft Compact (Incl 2) are also inclosed for your review. I would appreciate your forwarding to me any comments or specific suggested changes that you might have by 6 February 1976.

Sincerely,

2 Incl
As stated

F. P. KOISCH
Major General, USA
Chairman, Red River Compact Commission

CF:
Mr. Forrest Nelson w incl

RECEIVED
DEC 11 1975
OKLAHOMA WATER
RESOURCES BOARD

52ND MEETING
RED RIVER COMPACT COMMISSION
Ramada Inn Convention Center
Dallas, Texas
6 November 1975

ATTENDANCE LIST

Members of Compact Commission

General F. P. Koisch	Federal Representative and Chairman, Corps of Engineers, USA	Vicksburg, MS
Americ Bryniarski	Acting Commissioner	Little Rock, AR
Daniel V. Cresap	Commissioner	Baton Rouge, LA
Orville B. Saunders	Commissioner	Altus, OK
Ortha F. Dent	Commissioner	Austin, TX

Members of Engineering Advisory Committee

A. P. Theis	Louisiana Department of Public Works	Baton Rouge, LA
Richard Bennett	Louisiana Department of Public Works	Baton Rouge, LA
Forrest Nelson	Oklahoma Water Resources Board	Oklahoma City, OK
Ivan M. Stout	Texas Water Development Board	Austin, TX
Paul B. Wilson	Oklahoma Water Resources Board	Oklahoma City, OK
Robert M. Whitenton	Texas Water Rights Commission	Austin, TX

Members of Legal Advisory Committee

Rod Gorman	Assistant Attorney General of Texas	Houston, TX
Doug Caroom	Assistant Attorney General of Texas	Houston, TX

Others Present

Fred H. Bayley III	Corps of Engineers, LMVD	Vicksburg, MS
Lawrence N. Flanagan	Corps of Engineers, LMVD	Vicksburg, MS
Rodger Harris	Corps of Engineers, LMVD	Vicksburg, MS
Ron Hula	Corps of Engineers, SWD	Dallas, TX
David Norris	Alternate Commissioner, Oklahoma	Broken Bow, OK

D R A F T
Flanagan/mda/385
November 1975

MINUTES OF THE 52nd MEETING
RED RIVER COMPACT COMMISSION
RAMADA INN CONVENTION CENTER
DALLAS, TEXAS
6 November 1975

The 52nd meeting of the Red River Compact Commission convened at 9:00 a.m. on 6 November 1975, at the Ramada Inn Convention Center in Dallas, Texas. An attendance list is inclosed (Incl 1). The Federal Chairman of the Commission, General F. P. Koisch, opened the meeting with an introduction of those present.

The minutes of the 51st meeting were read and approved.

The Chairman then read a letter from Mr. Saxton, Commissioner from Arkansas, recommending that unless Louisiana resumes negotiations on Reach III, the authority of negotiations be voided and a new authorization be established so that states desiring to enter into a Compact be allowed to do so (Incl 2).

In his Engineering Advisory Committee report Mr. Forrest Nelson stated that on Reach I both Texas and Oklahoma had made proposals which were unacceptable to the other state. He pointed out that Oklahoma had agreed to allow Texas full development rights on Prairie Dog Town Fork and for that concession was asking for 70 percent of the flow from the North Fork and its tributaries. At Lake Texoma he indicated Oklahoma wanted the split to be based on contribution of flow; whereas, Texas wanted a simple 50-50 split.

On Reach II, Mr. Nelson discussed present proposals and told the group that the main difference now was in identifying the mainstem subbasin

from which Louisiana low flows would come; Oklahoma maintained that this area should be identified by the last mainstem tributary dams which they had already listed for Oklahoma. Texas to the contrary wanted to bring all dams with water rights down to a few acre feet into the Compact. Mr. Nelson stated that under Texas law a 200-acre domestic use lake could now be built without a permit and that in his opinion we should be trying for a broader Compact.

Mr. Nelson indicated that on Reach III he thought Louisiana and Texas were close to agreement.

After Mr. Nelson's Engineering Advisory Committee report a general discussion of Compact problems ensued. Judge Dent in his comments about Reach I reinterated the issues involved in the North Fork area with the Altus Lugert Drainage District. He stated that Oklahoma had never disagreed with municipal and industrial water development in Texas on the North Fork and that in reality the topography was such that irrigation projects could not be built. He advised that even though this was the case, it should not be prohibited in a Compact. Judge Dent said he was willing in the way of a concession to Texas to write into the Compact a twenty year moratorium on the granting of permits for irrigation projects on the North Fork and its tributaries. He further indicated that in their latest proposal to Oklahoma there was the proposition that Oklahoma would be allowed to build two municipal and industrial water supply projects, one on McClellan Creek and one on Sweetwater Creek. If both projects were built, Judge Dent pointed out, they would

control only about 30 percent of the water; so Oklahoma would in reality get their proposed 70 percent without spelling it out in the Compact. Mr. Saunders said this latest Texas proposal might serve as a basis for agreement.

The Chairman then proposed that he as coordinator be allowed to prepare an official draft Compact utilizing past proposals. This document would serve as a basis for determining where the differences between states were and if a basis for further negotiations existed. He further proposed that the Commission be allowed only two additional meetings at approximately six-month intervals to revise the draft and come to a final agreement. After this time, if no agreement was reached, he would recommend to the President of the United States that the Red River Compact Commission be abolished. All the Commissioners agreed that this would be a reasonable approach.

Mr. Gorman stated that Texas had already prepared a draft Compact that he thought would serve the purpose of the Commission. The Chairman indicated his desire that the official draft come from his office even though he could probably use the Texas draft as a basis. Mr. Cresap proposed that the Texas draft be accepted as a basis for making the coordinator's official draft. The Commissioners agreed to review the Texas draft and send any recommended changes to the Chairman before preparation of the official draft was completed. Mr. Bayley stated that for the comments to be of benefit, they would need to be submitted within two weeks.

In his remarks Mr. Cresap expressed surprise at Mr. Saxton's letter and indicated that progress had been made on Reach IV since the last Commission meeting.

Mr. Cresap advised the group that Mr. Belanger, Chairman of the Legal Advisory Committee, had retired and recommended that a new chairman be appointed. It was pointed out that Mr. Gorman would also be leaving the Committee. The new committee organization was recognized as being Mr. Jim Barnett, Oklahoma; Mr. H. David Smith, Louisiana; Mr. Doug Caroom, Texas; and Mr. John Gibson, Arkansas. It was agreed that as senior member of the group, Mr. Gibson should be the new chairman. General Koisch said he would send Mr. Gibson a formal announcement of his appointment.

Mr. Gorman stated that it would be advisable for all state Legal Advisory Committee representatives to be present at the next meeting. It was also agreed that Mr. Walter Kiechel from the Department of Justice should be invited to attend the next meeting.

The Chairman stated his preference that, if practical, the states should handle administration of the Compact without a Federal representative.

In closing a timetable for consummating the Compact was outlined by the Chairman. He said that within 30 days he would send to the Commissioners review copies of the official draft. Within the next 60 days he would receive comments on the draft. During the following 3 months the states

would try to resolve problems through a series of working sessions primarily by the Engineering Advisory Committee. In April 1976 he would call the first of the last two Commission meetings at which time progress would be reported and the draft reviewed. Then in an additional six months the final meeting would be held.

The Commissioners agreed that the next meeting would not be held in Dallas.

The meeting was adjourned.

RED RIVER REACH I

TEXAS DRAFT

September 4, 1975

A number of different methods for the apportionment of the waters of the Red River Basin Reach I have been considered by the Engineering Advisory Committee. The "Drainage Area Method" is not feasible for Reach I as large areas in this reach are covered by shallow depressions having no outlets and thus do not contribute substantial surface flow to the Red River. Differentiation of contributing and noncontributing drainage areas would be extremely difficult.

The "Conservation Storage Method" was also considered. Reservoir sites suitable for storage were found to be very near the state line and would thus entail multitudinous problems in the administration of a compact. This method is not considered applicable to conditions in Reach I

The "Percentage of Flow Method" was studied by the Engineering Advisory Committee and is considered applicable to Reach I. The Committee therefore makes the flowing specific recommendations:

A. For purposes of apportionment of the waters of Red River Basin, Reach I, the following subbasins be established:

1. Interstate Streams--Texas and Oklahoma

The Interstate Streams--Texas and Oklahoma sub-basin shall consist of those streams and their tributaries above the ~~most~~ last downstream existing, authorized or proposed dam site, originating in Texas and crossing the Texas-Oklahoma State line one or more times before flowing into the Red River Main Stem or Lake Texoma. These streams are as follows:

BW change

Buck Creek
Lebos Creek
Salt Fork Red River
North Fork Red River
Washita River

2. Intrastate Streams--Texas

The Intrastate Streams--Texas sub-basin shall consist of those streams and their tributaries above the ~~most~~ last downstream existing, ~~authorized or proposed dam sites~~, wholly in Texas and flowing into Red River Main Stem or Lake Texoma above Denison Dam. The streams are as follows:

BW change

Groesbeck Creek
Pease River
Wichita River
Belknap Creek
Mountain Creek
Beaver Creek
Prairie Dog Fork Red River
Wanderers Creek
China Creek
Little Wichita River
Farmers Creek
Fish Creek

3. Intrastate Streams--Oklahoma

The Intrastate Streams--Oklahoma sub-basin shall consist of those streams and their tributaries above the ~~most~~ last downstream existing, ~~authorized or proposed~~ dam ~~sites,~~ wholly in Oklahoma and flowing into Red River Main Stem or Lake Texoma above Denison Dam. The streams are as follows:

BW Change

Cache Creek	Beaver Creek
Mud Creek	Walnut Creek
Hickory Creek	

4. ~~5.~~ Red River-Main Stem

Red River-Main Stem shall consist of all those intervening areas on both sides of the river from the Texas-Oklahoma state line to Denison Dam not specifically delineated in the four subbasins above and including Lake Texoma.

B. The "Percentage of Flow Method" be used as a means of apportioning the waters of the Red River, Reach I, between the State of Texas and the State of Oklahoma in the following manner:

1. Interstate Streams--Texas

The State of Texas shall have the free and unrestricted use of the waters of this sub-basin as designated by Par. A.1., subject to the limitation that Texas shall allow a quantity of water equal to 40 percent of the total weekly runoff originating below the last downstream dam sites in Texas to flow into Oklahoma. Where there is no designated last downstream dam sites, Texas

shall allow to flow into Oklahoma a quantity of water equal to 40 percent of the total weekly runoff (less natural losses) originating above the State line. Texas may use the bed and banks downstream of the last downstream dam site for the purpose of conveying its share of water to designated downstream diversions. The streams and their tributaries with existing, authorized or proposed last downstream dam sites are as follows:

Stream	Site	Location
Buck Creek		
Lebos Creek		
Salt Fork Red River		
North Fork Red River		
Washita River		

2. Interstate Streams--Oklahoma

The State of Oklahoma shall have the free and unrestricted use of the waters of this sub-basin as designated by Para. A.1., subject to the limitation that Oklahoma shall allow a quantity of water equal to 40 percent

of the total weekly runoff originating below the last downstream dam sites to flow into the Red River Main-Stem or Lake Texoma. Where there is no designated last downstream dam site, Oklahoma shall allow to flow into Red River Main Stem or Lake Texoma a quantity of water equal to 40 percent of the total weekly runoff (less natural losses) originating above the State line. Oklahoma may use the bed and banks downstream of the last downstream dam site for the purpose of conveying its share of water to designated downstream diversions. The streams and their tributaries with existing, authorized or proposed last downstream dam sites are as follows:

Stream	Site	Location
Buck Creek		
Lebos Creek		
Salt Fork Red River		
North Fork Red River	Lake Altus	
Washita River		

3. Intrastate Streams--Texas

The State of Texas shall have free and unrestricted use of the waters of this sub-basin as designated by Para. A.2., provided that Texas may use the beds and banks downstream from this sub-basin, including the mainstem of the Red River, for the purpose of conveying water originating in this sub-basin to designated downstream diversions. The last downstream ~~existing~~, ~~authorized or proposed~~ dams ~~sites~~ on streams in this sub-basin, include all constructed dams; those presently cons[illegible] ~~are as follows (future dam sites can be~~ and also those constructed in the future ~~[illegible]~~ by the state of Tex ~~added when construction is complete).~~

Stream	Site	Location
Buck Creek		
Lebos Creek		
Salt Fork Red River		
North Fork Red River		
Washita River		

4. Intrastate Streams--Oklahoma

The State of Oklahoma shall have free and unrestricted use of the waters of this sub-basin as designated in Para. A-3, provided that Oklahoma may use the beds and banks downstream from this sub-basin, including the mainstem of the Red River, for the purpose of conveying water originating in this sub-basin to designated downstream diversions. The last downstream existing, ~~authorized or proposed~~ dam~~s sites in this sub-basin are as follows (future dams sites can be added when construction is complete).~~ on streams in this sub basins incl. - - -

Same as A

Stream	Site	Location
Buck Creek		
Lebos Creek		
Salt Fork Red River		
North Fork Red River		
Washita River		

5. Mainstem-Red River

   The States of Texas and Oklahoma shall have the free and unrestricted use of the runoff from their portion of this sub-basin, provided that a quantity of water equal to 40 percent of the total weekly runoff shall be allowed to flow into Lake Texoma.

6. Lake Texoma

   The State of Texas and Oklahoma shall share equally the inflow to Lake Texoma.

C. The administrative body established by this Compact adopt rules and regulations and methods of procedure for:

   1. Obtaining streamflow records and precipitation and evaporation records for the proper implementation of this Compact.

   2. Accounting of runoff from each stream and balancing of accrued credits or debits on runoff from each stream on a water-year basis, shall be made by March 1 of the following year.

Texas

RED RIVER REACH I

REVISED DRAFT

September 9, 1975

A number of different methods for the apportionment of the waters of the Red River Basin Reach I have been considered by the Engineering Advisory Committee. The "Drainage Area Method" is not feasible for Reach I as large areas in this reach are covered by shallow depressions having no outlets and thus do not contribute substantial surface flow to the Red River. Differentiation of contributing and noncontributing drainage areas would be extremely difficult.

The "Conservation Storage Method" was also considered. Reservoir sites suitable for storage were found to be very near the state line and would thus entail multitudinous problems in the administration of a compact. This method is not considered applicable to conditions in Reach I.

The "Percentage of Flow Method" was studied by the Engineering Advisory Committee and is considered applicable to Reach I. The Committee therefore makes the following specific recommendations:

A. For purposes of apportionment of the waters of Red River Basin, Reach I, the following sub-basins be established:

1. Interstate Streams--Texas and Oklahoma

The Interstate Streams--Texas and Oklahoma sub-basin shall consist of those streams and their tributaries above the last downstream existing, authorized or proposed dam site, originating in Texas and crossing the Texas-Oklahoma State line one or more times before flowing into Lake Texoma or the Red River Main Stem above Denison Dam.

These interstate streams are as follows:

Sweetwater Creek
Buck Creek
Lebos Creek
Salt Fork Red River
North Fork Red River
Washita River

2. Intrastate Streams--Texas

The Intrastate Streams--Texas sub-basin shall consist of those streams and their tributaries above the last downstream existing dams, wholly in Texas and flowing into Lake Texoma or Red River Main Stem above Denison Dam. The intrastate streams in Texas include all Reach I streams other than interstate streams and their tributaries.

3. Intrastate Streams--Oklahoma

The Intrastate Streams--Oklahoma sub-basin shall consist of those streams and their tributaries above the last downstream existing dams, wholly in Oklahoma and flowing into Lake Texoma or Red River Main Stem above Denison Dam. The intrastate streams in Oklahoma include all Oklahoma Reach I streams other than interstate streams and their tributaries.

4. Red River Main Stem

Red River Main Stem shall consist of all those intervening areas on both sides of the river from the Texas-Oklahoma state line to Denison Dam not specifically delineated in the four sub-basins above, including Lake Texoma.

B. The "Percentage of Flow Method" be used as a means of apportioning the waters of the Red River, Reach I, between the State of Texas and the State of Oklahoma in the following manner:

1. Interstate Streams--Texas

The State of Texas shall have the free and unrestricted use of the waters of this sub-basin as designated by Par. A.1., subject to the limitation that Texas shall allow a quantity of water equal to 40 percent of the total ~~weekly~~ annual runoff originating below the last downstream dams in Texas to flow into Oklahoma. Where there is no designated last downstream dam, Texas shall allow to flow into Oklahoma a quantity of wat equal to 40 percent of the total ~~weekly~~ annual runoff (less natural losses) originating above the State line. Texas may use the bed and banks downstream from the last downstream dams for the purpose of conveying its share of water to designated downstream diversions. The streams and their tributaries with existing last downstream dams and proposed last downstream dam sites authorized by the compact are as follows:

Streams	Site	Conservation Capacity Ac-Ft	Location

(Data being compiled by Texas Engineer Advisors)

2. Interstate Streams--Oklahoma

The State of Oklahoma shall have the free and unrestricted use of the waters of this sub-basin as designated by Para. A.1., subject to the limitation that Oklahoma shall allow a quantity of water equal to 40 percent of the total ~~weekly~~ annual runoff originating below the last downstream dams to flow into the Red River Main Stem or Lake Texoma. Where there is no designated last downstream dam, Oklahoma shall allow to flow into Red River Main Stem or Lake Texoma a quantity of water equal to 40 percent of the total ~~weekly~~ annual runoff (less natural losses) originating above the State line. Oklahoma may use the bed and banks downstream from the last downstream dams for the purpose of conveying its share of water to designated downstream diversions. The streams and their tributaries with existing last downstream dams and proposed last downstream dam sites authorized by this Compact are as follows:

Stream	Site	Conservation Capacity Ac - Ft	Location
Buck Creek	None	--	--
Lebos Creek	Lebos Reservoir	57,000	21-T1S-R21W
Salt Fork Red River	Mangum Reservoir	247,000	33-T5N-R22W
North Fork Red River	~~Lake Altus~~		
	~~Greer Reservoir~~		
	~~Port Reservoir~~		
	~~Hobart Reservoir~~		
	Headrick Reservoir	152,000	35-T5N-R18W
	Mtn. Park Reservoir	88,400	33-T5N-R17W
Washita River	Durwood Reservoir	660,000	5-T4S-R4E
	~~Carnegie Diversion Dam~~		
	Fort Cobb Reservoir		
	Gracemont Reservoir		
	Verden Reservoir		
	Kechi Reservoir		
	Pauls Valley Reservoir		
	Purdy Reservoir		
	Hennepin Reservoir		
	Arbuckle Reservoir		
	Caddo Reservoir		
	Ardmore Reservoir		
	~~Davis Reservoir~~		

(This data to be corrected by Oklahoma Engineer Advisors)

3. Intrastate Streams--Texas

The State of Texas shall have free and unrestricted use of the waters of this sub-basin as designated by Para. A.2.,

provided that Texas may use the beds and banks downstream from this sub-basin, including the mainstem of the Red River, for the purpose of conveying water originating in this sub-basin to designated downstream diversions. The last downstream existing dams on streams in this sub-basin include all constructed dams, those presently constructed and also those constructed in the future.

4. Intrastate Streams--Oklahoma

The State of Oklahoma shall have free and unrestricted use of the waters of this sub-basin as designated in Para. A-3, provided that Oklahoma may use the beds and banks downstream from this sub-basin, including the mainstem of the Red River, for the purpose of conveying water originating in this sub-basin to designated downstream diversions. The last downstream existing dams on streams in this sub-basin include all constructed dams, those presently constructed and also those constructed in the future.

5. Mainstem-Red River

The States of Texas and Oklahoma shall have the free and unrestricted use of the runoff from their portion of this sub-basin, provided that a quantity of water equal to 40 percent of the total weekly runoff shall be allowed to flow into Lake Texoma.

6. Lake Texoma

The State of Texas and Oklahoma shall share equally the inflow to Lake Texoma.

C. The administrative body established by this Compact adopt rules and regulations and methods of procedure for:

1. Obtaining streamflow records and precipitation and evaporation records for the proper implementation of this Compact.

2. Accounting of runoff from each stream and balancing of accrued credits or debits on runoff from each stream on a water-year basis, shall be made by March 1 of the following year.

RED RIVER REACH II

OKLAHOMA RECOMMENDATIONS DRAFT

September 22, 1975

A number of different methods for apportioning the waters of Red River Basin Reach II have been considered by the Engineering Advisory Committee.

The "Drainage Area Method" is not believed to be feasible for Reach II as there is considerable variance in rainfall and runoff throughout this area.

The "Conservation Storage Method" is not believed to be feasible for Reach II because of the limited number of sites available for construction of Reservoirs.

The "Surveillance of Flow Method" was considered by the Engineering Advisory Committee and is considered feasible for Reach II.

The Committee therefore makes the following specific recommendations:

A. For purposes of apportioning the waters of Red River Basin Reach II, sub-basins be established as follows:

1. Intrastate Streams-Oklahoma

   The Intrastate Streams-Oklahoma sub-basin shall consist of those streams and their tributaries above existing, authorized or proposed last downstream major dam sites, wholly in Oklahoma and flowing into Red River below Denison Dam and above the Oklahoma-Arkansas stateline. The last downstream dams in Oklahoma are defined to include all downstream dams in existance on the date of approval of the Compact by the Compact Commissioners and in addition to include the following authorized and proposed last downstream major dam sites:

Stream	Site	Location Stream Mile
Island Bayou	Albany	6.5
Blue River	Durant	13.0
Boggy River	Boswell	18.9
Kiamichi River	Hugo	17.6
Gates Creek	Raymond Gary	4.0
Norwood Creek	Ward	3.5

2. Intrastate Streams-Texas

Intrastate Streams-Texas sub-basin shall consist of those streams and their tributaries above existing, authorized or proposed last downstream major dam sites, wholly in Texas and flowing into Red River below Denison Dam and above the Texas-Arkansas stateline. The last downstream dams in Texas are defined to include all downstream dams in existance on the date of approval of the Compact by the Compact Commissioners and in addition to include the following authorized and proposed last downstream major dam sites:

Stream	Site	Location Stream Mile
Brushy Creek	Brushy Creek Lake	5
Bois d'Arc Creek	Bonham	35
Timber Creek	Timber Creek Reservoir	2.0
Big Pine Creek	Big Pine Lake	13.2
Pecan Bayou	Pecan Bayou Reservoir	15
Mud Creek	Liberty Hill Reservoir	8.0
Barkman Creek	Barkman Creek Reservoir	10

3. Interstate Streams-Oklahoma and Arkansas

The Interstate Streams-Oklahoma and Arkansas sub-basin shall consist of those streams and their tributaries above existing, authorized or proposed major dam sites, originating in Oklahoma or Arkansas and crossing the Oklahoma-Arkansas stateline one or more times before flowing into the Red River in Arkansas. These streams and their tributaries with existing, authorized or proposed last downstream major dam sites are as follows:

Stream	Site	Location Stream Mile
In Oklahoma		
Little River	Pine Creek	145.3
Glover Creek	Lukfata	17.3
Mountain Fork River	Broken Bow	20.3
In Arkansas		
Little River	Millwood	16.0

4. Interstate Streams-Texas and Arkansas

The Interstate Streams-Texas and Arkansas sub-basin shall consist of those streams and their tributaries above existing, authorized or proposed major dam sites, originating in Texas and crossing the Texas-Arkansas stateline before flowing into the Red River in Arkansas. These streams and their tributaries with existing, authorized or proposed last downstream major dam sites are as follows:

Stream	Site	Location Stream Mile
McKinney Bayou (Clear Fork Creek	Waterworks	1.5)
Sulphur River	Texarkana	45.0

5. Mainstem-Red River

The Mainstem-Red River sub-basin shall consist of all those streams and their tributaries flowing into Red River below Denison Dam and above the Arkansas-Louisiana stateline not specifically included in the other four sub-basins of Reach II.

B. For purposes of apportioning the waters of Red River Reach II, the "Surveillance of Flow Method" be used to divide the flows of the five sub-basins established by Par. A. as follows:

1. Intrastate Streams-Oklahoma

The State of Oklahoma shall have free and unrestricted use of the waters of this sub-basin as designated by Par. A. 1., provided that Oklahoma may use the beds and banks downstream of this sub-basin, including the mainstem of Red River, for the purpose of conveying water originating in this sub-basin to designated downstream diversions, subject to the low flow requirements set forth in part B., 3., a.

2. Intrastate Streams-Texas

The State of Texas shall have free and unrestricted use of the waters of this sub-basin as designated by Par. A. 2., provided that Texas may use the beds and banks downstream of this sub-basin, including the mainstem of Red River, for the purpose of conveying water originating in this sub-basin to designated downstream diversions, subject to the low flow requirements set forth in part B., 3., a.

3. Mainstem-Red River

The States of Oklahoma, Texas and Arkansas shall have free and unrestricted use of the waters of this sub-basin as designated in Para. A. 5., provided that:

a. At any time when the flow at the Arkansas-Louisiana stateline reaches 3000 cfs, a continuous surveillance operation will be commenced. When the flow reaches 1000 cfs the States of Arkansas, Texas and Oklahoma will not divert water from the Main Stem of the Red River.

C. No state guarantees to maintain a minimum low flow to a downstream state, however, the States of Oklahoma, Texas and Arkansas mutually agree to regulate under their respective state laws the diversion of runoff originating in the Mainstem-Red River sub-basin as designated in Para. A. 5., and the diversion of designated water passed from upstream sub-basins or Reach I, in compliance with the provisions of Para. B., 1., a.

D. The administrative body established by this compact adopt rules, regulations and modes of procedure for:

1. Obtaining hydorlogic records to properly implement and operate this compact; and,
2. Accounting runoff from each stream sub-basin on a weekly basis, summarized and reported on the water-year basis by March 1 of the following year.

RED RIVER REACH I
OKLAHOMA REVISED DRAFT
October 1, 1975

A number of different methods for the apportionment of the waters of the Red River Basin Reach I have been considered by the Engineering Advisory Committee. The "Drainage Area Method" is not feasible for Reach I as large areas in this reach are covered by shallow depressions having no outlets and thus do not contribute substantial surface flow to the Red River. Differentiation of contributing and noncontributing drainage areas would be extremely difficult.

The "Conservation Storage Method" was also considered. Reservoir sites suitable for storage were found to be very near the state line and would thus entail multitudinous problems in the administration of a compact. This method is not considered applicable to conditions in Reach I.

The "Percentage of Flow Method" was studied by the Engineering Advisory Committee and is considered applicable to Reach I. The Committee therefore makes the following specific recommendations:

A. For purposes of apportionment of the waters of Red River Basin, Reach I, the following sub-basins be established:

1. Interstate Streams--Texas and Oklahoma

The Interstate Streams--Texas and Oklahoma sub-basin shall consist of those streams and their tributaries above the last downstream existing, authorized or proposed dam site, originating in Texas and crossing the Texas-Oklahoma State line one or more times before flowing into Lake Texoma or the Red River Main Stem above Denison Dam.

These interstate streams are as follows:

Sweetwater Creek
Buck Creek
Lebos Creek
Salt Fork Red River
North Fork Red River
Washita River

2. Intrastate Streams--Texas

The Intrastate Streams--Texas sub-basin shall consist of those streams and their tributaries above the last downstream existing dams, wholly in Texas and flowing into Lake Texoma or Red River Main Stem above Denison Dam. The intrastate streams in Texas include all Reach I streams other than interstate streams and their tributaries.

3. Intrastate Streams--Oklahoma

The Intrastate Streams--Oklahoma sub-basin shall consist of those streams and their tributaries above the last downstream existing dams, wholly in Oklahoma and flowing into Lake Texoma or Red River Main Stem above Denison Dam. The intrastate streams in Oklahoma include all Oklahoma Reach I streams other than interstate streams and their tributaries.

4. Red River Main Stem

Red River Main Stem shall consist of all those intervening areas on both sides of the river from the Texas-Oklahoma state line to Denison Dam not specifically delineated in the four sub-basins above, including Lake Texoma.

B. The "Percentage of Flow Method" be used as a means of apportioning the waters of the Red River, Reach I, between the State of Texas and the State of Oklahoma in the following manner:

1. Interstate Streams--Texas

The State of Texas shall have the free and unrestricted use of the waters of this sub-basin as designated by Par. A.1., subject to the limitation that Texas shall allow a quantity of water equal to 40 percent of the total annual runoff. originating below the last downstream dams in Texas to flow into Oklahoma. Where there is no designated last downstream dam, Texas shall allow to flow into Oklahoma a quantity of wat equal to 40 percent of the total annual runoff (less natural losses) originating above the State line.--Excepting the interstate stream of North Fork Red River wherein the State of Texas will allow 70 percent (less natural losses) of the total annual runoff, originating in this basin, to cross the Oklahoma-Texas state line. Texas may use the bed and banks downstream from the last downstream dams for the purpose of conveying its share of water to designated downstream diversions. The streams and their tributaries with existing last downstream dams and proposed last downstream dam sites authorized by the compact are as follows:

Streams	Site	Conservation Capacity Ac-Ft	Location

(Data being compiled by Texas Engineer Advisors)

2. Interstate Streams--Oklahoma

The State of Oklahoma shall have the free and unrestricted use of the waters of this sub-basin as designated by Para. A.1., subject to the limitation that Oklahoma shall allow a quantity of water equal to 40 percent of the total annual runoff originating below the last downstream dams to flow into the Red River Main Stem or Lake Texoma. Where there is no designated last downstream dam, Oklahoma shall allow to flow into Red River Main Stem or Lake Texoma a quantity of water equal to 40 percent of the total annual runoff (less natural losses) originating above the State line. Oklahoma may use the bed and banks downstream from the last downstream dams for the purpose of conveying its share of water to designated downstream diversions. The streams and their tributaries with existing last downstream dams and proposed last downstream dam sites authorized by this Compact are as follows:

Stream	Site	Conservation Capacity Ac - Ft	Location
Buck Creek	None	--	--
Lebos Creek	Lebos Reservoir	57,000	21-T 1S- R 21WIM
Salt Fork Red River	Mangum Reservoir	247,000	33-T 5N- R 22WIM
North Fork Red River	Headrick Reservoir	152,000	35-T 3N- R 18WIM
	Mtn. Park Reservoir	88,400	33-T 3N- R 17WIM
Washita River	Durwood Reservoir	660,000	5- T 4S- R 4EIM

3. Intrastate Streams--Texas

The State of Texas shall have free and unrestricted use of the waters of this sub-basin as designated by Para. A.2.,

provided that Texas may use the beds and banks downstream from this sub-basin, including the mainstem of the Red River, for the purpose of conveying water originating in this sub-basin to designated downstream diversions. The last downstream existing dams on streams in this sub-basin include all constructed dams, those presently constructed and also those constructed in the future.

4. Intrastate Streams--Oklahoma

The State of Oklahoma shall have free and unrestricted use of the waters of this sub-basin as designated in Para. A-3, provided that Oklahoma may use the beds and banks downstream from this sub-basin, including the mainstem of the Red River, for the purpose of conveying water originating in this sub-basin to designated downstream diversions. The last downstream existing dams on streams in this sub-basin include all constructed dams, those presently constructed and also those constructed in the future.

5. Mainstem-Red River

The States of Texas and Oklahoma shall have the free and unrestricted use of the runoff from their portion of this sub-basin, provided that a quantity of water equal to 40 percent of the total weekly runoff shall be allowed to flow into Lake Texoma.

6. Lake Texoma

The State of Texas and the State of Oklahoma shall have free and unrestricted use of all the waters of the Main Stem of the Red River and Lake Texoma subject to the following limitations:

The water shall be divided between the two states in that proportion that each State contributes to the flow of the stream and the storage of Lake Texoma.

C. The administrative body established by this Compact adopt rules and regulations and methods of procedure for:

1. Obtaining streamflow records and precipitation and evaporation records for the proper implementation of this Compact.

2. Accounting of runoff from each stream and balancing of accrued credits or debits on runoff from each stream on a water-year basis, shall be made by March 1 of the following year.

RECEIVED
NOV 8 1977
Central Records
Texas Dept. of Water Resources

LMVPD-M

21 June 1976

RECEIVED
JUN 25 1976
TEXAS WATER
DEVELOPMENT BOARD

Honorable Ortha F. Dent
Interstate Compact Commissioner
for the Red River
2502 Rogge Lane
Austin, Texas 78723

Dear Judge Dent:

A draft of the minutes for the 53d meeting of the Red River Compact Commission (Incl 1) is provided for your review. Please furnish me any corrections or suggested changes you may have prior to our next meeting.

As agreed at our Dallas meeting, I have prepared a clean draft Compact for your consideration. The draft (Incl 2) is complete with the exception of Articles XI and XIII which are being redrafted by the Legal Committee. I will distribute copies of these articles when complete. If you have a significant number of comments on the draft, please furnish them to me by 1 September 1976, and I will prepare another color coded draft similar to that used at our last meeting.

Mr. John Saxton has agreed to host our next meeting in Little Rock, Arkansas on 21 and 22 September 1976. Specific details will be furnished later. I am confident that with the progress attained at our Dallas meeting, and with a continued effort by each state, we can resolve most remaining problems in September.

Sincerely,

2 Incl
As stated

F. P. KOISCH
Major General, USA
Chairman, Red River Compact Commission

CF:
Mr. Ivan M. Stout w incl
Mr. Robert Whitenton w incl

DRAFT

MINUTES OF THE 53rd MEETING
RED RIVER COMPACT COMMISSION
AIRPORT MARINA HOTEL

Dallas, Texas

12-13 May 1976

The 53rd meeting of the Red River Compact Commission convened at 9:00 a.m. on 12 May 1976, at the Airport Marina Hotel in Dallas, Texas. An attendance list is enclosed (Incl 1).

The minutes of the 52nd meeting were read and approved subject to several editorial comments on pages 2 and 3 by the State of Texas.

The Chairman in his opening statement expressed optimism in the progress made in negotiations and pointed out the importance of maintaining the momentum that had been achieved.

After a brief statement by each Commissioner, a page by page discussion of the December 1975 Compact draft, color coded to reflect comments by all states, was made.

A lengthy discussion followed on Article II - General Provisions, particularly on Sections 2.01 and 2.07 which deal with water uses by the United States. It was agreed that the Department of Justice should comment on these sections. It was questioned whether or not the sections should be included. Oklahoma expressed concern over the wording of section 2.03 which deals with natural losses and requested deletions of the reference to "stored water."

Attach 21-76
251

A section dealing with the protection of existing water rights was proposed by Texas and it was agreed that it would be added as the last section to the General Provisions. Article II was retyped and distributed for further comment.

Several editorial comments were agreed upon in Article III--Definitions. The paragraph dealing with definition of "fiscal year" was deleted. The definition of the terms "runoff" and "Major Damsite" were not agreed upon.

The States of Oklahoma and Texas agreed to a rewording of Article IV—Apportionment of Water—Reach I. This rewording was typed and distributed to the two States for further consideration. The basic change was to recognize the rights provided the States by the authorizing Act for Denison Dam and Reservoir, subject to the Special Provisions section. Also the rewrite included a 50-50 split of water flowing into Lake Texoma.

In discussions of Article V--Apportionment of Water--Reach II, no agreement was reached on the size of reservoirs which would define Subbasin 5. It was agreed to rewrite Section 5.03 as proposed by the Chairman and to delete reference in Section 5.04 to flows originating in Subbasin 5.

Mr. Cresap was charged with rewriting portions of Section 5.05. This was to be sent to the Chairman for inclusion in a new draft Compact.

A rewording of Article VI—Apportionment of Water—Reach III was agreed upon by the States of Texas and Louisiana. This article was retyped and distributed to the two States.

Article VII--Apportionment of Water—Reach IV was agreed upon by Louisiana and Arkansas essentially as written in the December 1975 draft with exception of low flow quantities in Section 7.03. Mr. Saxton indicated that members of his staff would contact the Vicksburg District Corps of Engineers to resolve discrepancies in low flow data.

The Legal Committee was charged with rewriting Article IX—Administration of the Compact; Article XI—Pollution; and Article XIII—Ratification and Effective Date of Compact.

In Article IX reference to individual state designation of Commissioners was to be deleted. Article XI was considered somewhat redundant and was to be shortened.

Paragraph 13.02(b)(1) in Article XIII concerning jurisdiction in disputes over pollution of water of the Red River was also to be reworded.

The Chairman indicated that after all rewriting was accomplished another draft would be issued. Mr. Saxton agreed to host the next meeting in Little Rock, Arkansas. A meeting date in September 1976 was to be agreed upon at a later time.

The meeting was adjourned.

53rd MEETING
RED RIVER COMPACT COMMISSION
AIRPORT MARINA HOTEL
Dallas, Texas

12-13 May 1976

ATTENDANCE LIST

Members of Compact Commission

General F. P. Koisch	Federal Representative and Chairman, Corps of Engineers USA	Vicksburg, MS
John P. Saxton	Commissioner	Little Rock, AR
Daniel V. Cresap	Commissioner	Baton Rouge, LA
Orville B. Saunders	Commissioner	Altus, OK
Ortha F. Dent	Commissioner	Austin, TX

Members of Engineering Advisory Committee

A. P. Theis	Louisiana Department of Public Works	Baton Rouge, LA
Richard Bennett	Louisiana Department of Public Works	Alexandria, LA
Forrest Nelson	Oklahoma Water Resources Board	Oklahoma City, OK
Paul R. Wilson	Oklahoma Water Resources Board	Oklahoma City, OK
Ivan M. Stout	Texas Water Resources Board	Austin, TX
Robert M. Whitenton	Texas Water Development Board	Austin, TX
Americ Bryniarski	Arkansas Dept. of Commerce Division of Soil and Water Resources	Little Rock, AR

Members of Legal Advisory Committee

John F. Gibson, Jr.	Arkansas Soil and Water Conservation Commission	
Doug Caroom	Assistant Attorney General of Texas	Houston, TX
H. David Smith	Louisiana Department of Public Works	Baton Rouge, LA

Others Present

Fred H. Bayley	Corps of Engineers, LMVD	Vicksburg, MS
Lawrence N. Flanagan	Corps of Engineers, LMVD	Vicksburg, MS
Terry Coomes	Corps of Engineers, SWD	Dallas, TX
Charles E. Nemir	Texas Water Development Board	Austin, TX

LMVPD-M

15 October 1976

Mr. Robert H. Whitenton
Texas Water Rights Commission
P.O. Box 12396
Capitol Station
Austin, Texas 78711

RECEIVED
OCT 22 1976
TEXAS WATER
DEVELOPMENT BOARD

Dear Mr. Whitenton:

A draft of the minutes for the 54th meeting of the Red River Compact Commission (Incl 1) is provided for your review. Please furnish me any corrections or suggested changes you may have prior to our next meeting. Also, as agreed at our meeting in Little Rock, I have prepared a clean draft Compact (Incl 2) for consideration by the various states.

Please notify me as soon as the State of Texas is ready to resume negotiations so I can set a date for our next Compact Commissioners meeting.

Sincerely,

2 Incl (dupe)
As stated

F. P. KOISCH
Major General, USA
Chairman, Red River Compact Commission

CF
Mr. Terry Coomes w incl
Mr. Ivan Stout w incl

MINUTES OF THE 54th MEETING
RED RIVER COMPACT COMMISSION
AMERICANA HOTEL-LITTLE ROCK, ARKANSAS
1-2 September 1976

The 54th meeting of the Red River Compact Commission convened at 1:30 p.m. on 1 September 1976, at the Americana Hotel in Little Rock, Arkansas. An attendance list is inclosed (Incl 1).

Mr. Saxton introduced Mr. Jim Wooten, Director of the Arkansas Department of Commerce, after which Mr. Wooten welcomed the group to Little Rock.

The minutes of the 53rd meeting were read and approved subject to several editorial comments by the State of Texas.

In his opening remarks the Chairman reminded the Commissioners of the timetable for consummating the Compact and urged them to try to maintain the momentum that had developed over the past months.

After a brief statement by each Commissioner it was agreed that an attempt would be made to tentatively approve the Compact section by section during the remainder of the meeting.

Article I-Purposes was approved as written in the June 1976 draft.

Article II-General Provisions was approved subject to a minor editorial change in Section 2.08.

Article III-Definitions was approved subject to changes to the definitions of "designated water" and "runoff" and the addition of a definition of "undesignated water."

The States of Texas and Oklahoma presented a new draft of Article IV-Reach I, which was approved by the Commissioners.

There were lengthy discussions during the meeting on Article V-Reach II,, particularly in regard to Section 5.05, Subbasin 5. Most of the Sections in Article V had changes which were to be reflected in the next draft.

The State of Oklahoma agreed to send the Chairman a list of the last downstream major damsites in Oklahoma with acre feet of conservation storage and location by UTM Grid Coordinates.. This was to be incorporated into the next draft with the UTM Grid location replacing stream mile location of damsites.

The State of Louisiana reserved approval of the rewritten Article V until they could see a list of dams within Oklahoma and Arkansas located in Subbasin 5. Commissioners from both Oklahoma and Arkansas agreed to send Mr. Cresap such a list.

Article VI-Reach III was approved as written in the June 1976 draft.

In discussions on Article VII-Reach IV, the State of Arkansas proposed that Section 7.03-Special Provisions, be rewritten (Incl 2). The State of Louisiana indicated they would study the Arkansas proposal and make a response. They requested a copy of Arkansas Legislation authorizing the state to furnish water to Louisiana. Mr. Gibson indicated he would send Mr. Cresap a copy of the law.

Article IX-Administration of the Compact was approved subject to several editorial changes and a rewrite of Section 9.01 provided by the Legal Subcommittee.

Article X-Powers and Duties of the Commission was approved subject to minor editorial corrections.

The Legal Advisory Subcommittee presented new drafts of Article XI-Pollution and Article XIII-Ratification and Effective Date of Compact. These new drafts were approved subject to minor editorial changes.

Article XII-Termination and Amendment of Compact was approved as written in the June 1976 draft.

The Chairman indicated he would incorporate all of the agreed upon changes in a clean draft and provide it for the Commissioners' consideration before the next meeting.

At the conclusion of the meeting, resolutions were passed by the Commissioners and the Engineering Advisory Committee commending Mr. Forest Nelson for his many years of service and dedication to the Commission.

It was agreed that the next meeting would be in New Orleans in November 1976.

The meeting was adjourned.

54th MEETING
RED RIVER COMPACT COMMISSION
AMERICANA HOTEL
Little Rock, AR

1-2 June 1976

ATTENDANCE LIST

Members of Compact Commission

General F. P. Koisch	Federal Representative and Chairman, Corps of Engineers, USA	Vicksburg, MS
John P. Saxton	Commissioner	Little Rock, AR
Daniel V. Cresap	Commissioner	Baton Rouge, LA
Orville B. Saunders	Commissioner	Altus, OK
Otha F. Dent	Commissioner	Austin, TX

Members of Engineering Advisory Committee

A. P. Theis	Louisiana Dept of Public Works	Baton Rouge, LA
Richard Bennett	Louisiana Dept of Public Works	Alexandria, LA
Forrest Nelson	Oklahoma Water Resources Board	Oklahoma City, OK
Paul R. Wilson	Oklahoma Water Resources Board	Oklahoma City, OK
Ivan M. Stout	Texas Water Development Board	Austin, TX
Robert M. Whitenton	Texas Water Rights Commission	Austin, TX
Americ Bryniarski	Arkansas Dept of Commerce, Division of Soil and Water Resources	Little Rock, AR

Members of Legal Advisory Committee

John F. Gibson, Jr.	Arkansas Soil and Water Conservation Commission	Dermott, AR
Doug Caroom	Assistant Attorney General of Texas	Austin, TX
H. David Smith	Louisiana Dept of Public Works	Baton Rouge, LA

Others Present

Fred H. Bayley	Corps of Engineers, LMVD	Vicksburg, MS
Lawrence N. Flanagan	Corps of Engineers, LMVD	Vicksburg, MS
Terry Coomes	Corps of Engineers, SWD	Dallas, TX
Jim Wooten	Arkansas Dept of Commerce	
Jack Gibson	Arkansas Soil and Water Conservation Commission	Parkdale, AR
Randy Young	Arkansas Dept of Commerce Division of Soil and Water Resources	Little Rock, AR
Carol Griffie	Arkansas Gazette	Little Rock, AR
Mary Martin	Arkansas Democrat	Little Rock, AR

STATE OF ARKANSAS PROPOSAL
FOR
Red River Compact Commission Section 7.03(b)
September 1976

b. The State of Arkansas does not guarantee to maintain a minimum low flow for Louisiana in Reach IV. However, on the following streams when the use of water in Arkansas reduces the flow at the Arkansas-Louisiana State line to the following amounts:

(1) Ouachita River 780 cfs

(2) Bayou Bartholomew 42 cfs

(3) Boeuf River 15 cfs

(4) Bayou Macon 10 cfs

The State of Arkansas agrees to regulate under its state law the diversions of runoff originating as flowing into Reach IV in such a manner as to permit an equitable apportionment of the runoff to flow into the State of Louisiana.

MINUTES OF THE 55th MEETING
RED RIVER COMPACT COMMISSION
VIEUX CARRE MOTOR LODGE - NEW ORLEANS, LOUISIANA

16 March 1977

The 55th meeting of the Red River Compact Commission convened at 9:30 a.m. on 16 March 1977, at the Vieux Carre Motor Lodge in New Orleans, Louisiana. An attendance list is inclosed.

The meeting was opened by the Chairman who extended a special welcome to Mr. Fred Parkey, the new Commissioner from Texas. After introductions the minutes of the 54th meeting were read and approved subject to several editorial comments.

The Chairman then presented, on behalf of the Commissioners, a plaque to Mr. Forrest Nelson commending him for his outstanding service as Chairman of the Engineering Advisory Committee.

Brief opening remarks were then made by the Chairman and the four State Commissioners.

Concerning the current draft of the proposed Compact, it was noted that except for editorial comments and definition of words, all articles of the Compact had been agreed upon with the exceptions of Article V-Reach II; Article VII-Reach IV; and Article XI-Pollution.

After a lengthy discussion of Section 5.03, Subbasin 3, in Article V-Reach II, it was agreed to delete all portions of subparagraph (a) after the words "Millwood Dam," to clarify the definition of the

various subbasins in Reach II. Questions also arose concerning the term "total annual runoff" in subparagraph (b). The State of Louisiana proposed leaving out the word "annual." The concern expressed by both Louisiana and Arkansas was that this wording allowed the State of Oklahoma to satisfy its delivery requirements to Arkansas during high flow periods, leaving Arkansas with less than an equitable share during periods of low runoff. Agreements were not reached on this point. The Chairman indicated that in the next draft he would not change this paragraph.

With regard to Section 5.04, Subbasin 4, Mr. Saxton brought out several points of concern to Arkansas. The first of these was that no guaranteed low flows from Texarkana Reservoir were written into the Compact, when in fact the Corps of Engineers was committed to making these releases.

It was pointed out that guaranteed low flows were written into the water supply contracts with Texarkana, Arkansas, and Texas, and that Section 2.07 probably adequately covered the United States commitment to deliver this water. The Chairman indicated that he would have the adequacy of Section 2.07 checked and if it was not adequate, he would recommend adding a new section to the General Provisions to cover prior commitments.

Another point of concern to Mr. Saxton was the fact that the Compact did not allocate water to navigation. The Chairman stated that in the

Red River Navigation Project studies it was recognized that a full 9-foot navigation channel in the presently authorized project would not be available 100 percent of the time and that navigation would have to accept water available. He indicated this would cause barges to be light loaded during critical periods. He further stated that on the basis of prior navigation project authorities water for navigation should not be allocated in the Compact. This would leave the states the flexibility of managing their water on a priority basis.

Mr. Parkey said that the State of Texas wanted to go on record as supporting navigation on the Red River and submitted a proposed change to Article I-Purposes, which would include development of navigation as a principle purpose of the Compact. The proposal was approved by the Commissioners.

In discussing the 96 cfs releases presently being made from Texarkana Reservoir, Mr. Saxton agreed that since this water was contracted for by the cities of Texarkana, Arkansas, and Texarkana, Texas, this would not be a proper item to include in the Compact.

In concluding the discussion of Section 5.04, Mr. Saxton indicated he would be satisfied to leave it as written in the draft.

The next item addressed was Section 5.06. Mr. Cresap stated that the State of Louisiana would not accept the exemption of all reservoirs of 1,000 acre-feet or less from terms of the Compact.

Mr. Cresap contended that Subbasin 5 should be defined by major

dam[illegible]

Correction to Minutes

10,(Insert between 1st & 2nd paragraph on page 4

this

in s "Mr. Parkey pointed out that Louisiana had previously agreed to Section 5.06 and that, if Louisiana desired to ~~scuttle the Compact, the withdrawal of Louisiana's concurrence with Section 5.06 appeared to be a quick way to do it.~~"

Mr. W Compact Reach II, she would have to agree to some compromise offering reasonable protection to existing water rights.

had n (Or words to this effect) 4-15-77 - Revised 4-20 approved by Fred Parkey

State

Mr. Saxton expressed concern that during extreme low flow periods the smaller uncontrolled reservoirs in Texas would capture most of the runoff leaving Arkansas to provide flows to Louisiana. After lengthy discussion on this section, Mr. Cresap agreed that he would contact the other states concerning this matter in an effort to work out a solution prior to the next meeting. ?

In Article VI-Reach III, Mr. Cresap noted that the term "flow" was used throughout and suggested this term be changed to "runoff." The other Commissioners concurred.

Ambiguities were noted in Article VII-Reach IV in the definition of subbasins. It was agreed that a subbasin breakdown for this reach was not needed, but that a list of last downstream major damsites in Arkansas should be included.

In discussing Section 7.03, Mr. Gibson assured Louisiana that the Arkansas State law does allow for allocation of water to riparian

users during times of shortage, and that Arkansas would have to deliver an equitable share to Louisiana. He further pointed out that they have a procedure for registering diversions during times of shortage.

The Chairman recommended that final wording of this section require Arkansas to deliver the amounts of water requested by the Compact Commission. This was agreed upon and the Attorneys for Louisiana and Arkansas agreed to work out final wording on this section.

The Chairman indicated that he would have this section rewritten to include the agreed upon changes.

Mr. Parkey asked the Chairman to explain the Commissions intent with regard to powers the Commissioners wanted in Article XI-Pollution. The Chairman indicated that this article was written with the intent that each state would have the obligation of obeying State and Federal Pollution Control laws, and that the Commission would have the power to act if it was agreed that a violation should be stopped. He stated that no police force by the Commission was envisioned.

The date of the next meeting was set for 28 April 1977. Mr. Saunders agreed to host the meeting in Oklahoma City, Oklahoma.

The Chairman asked Forrest Nelson to continue as Chairman of the Engineering Advisory Committee. Mr. Nelson agreed.

The Chairman indicated he would supply an updated draft of the proposed Compact to the Commissioners as the basis for future deliberation.

There was a disagreement as to whether verbatim transcripts of the meetings should be made. Mr. Caroom indicated that transcripts would be valuable, while Mr. Cresap stated he did not think they were needed. Mr. Nelson suggested that after a document was agreed upon, a verbatim transcript could be made of a statement by each Commissioner in which he described what he thought the Compact meant.

In closing, the Chairman indicated he would provide a summary and a copy of the tapes for this meeting.

The meeting was adjourned.

16 March 1977

ATTENDANCE LIST

Members of Compact Commission

General F. P. Koisch	Federal Representative and Chairman, Corps of Engineers, USA	Vicksburg, MS
John P. Saxton	Commissioner	Little Rock, AR
Daniel V. Cresap	Commissioner	Baton Rouge, LA
Orville B. Saunders	Commissioner	Altus, OK
Fred Parkey	Commissioner	Iowa Park, TX

Members of Engineering Advisory Committee

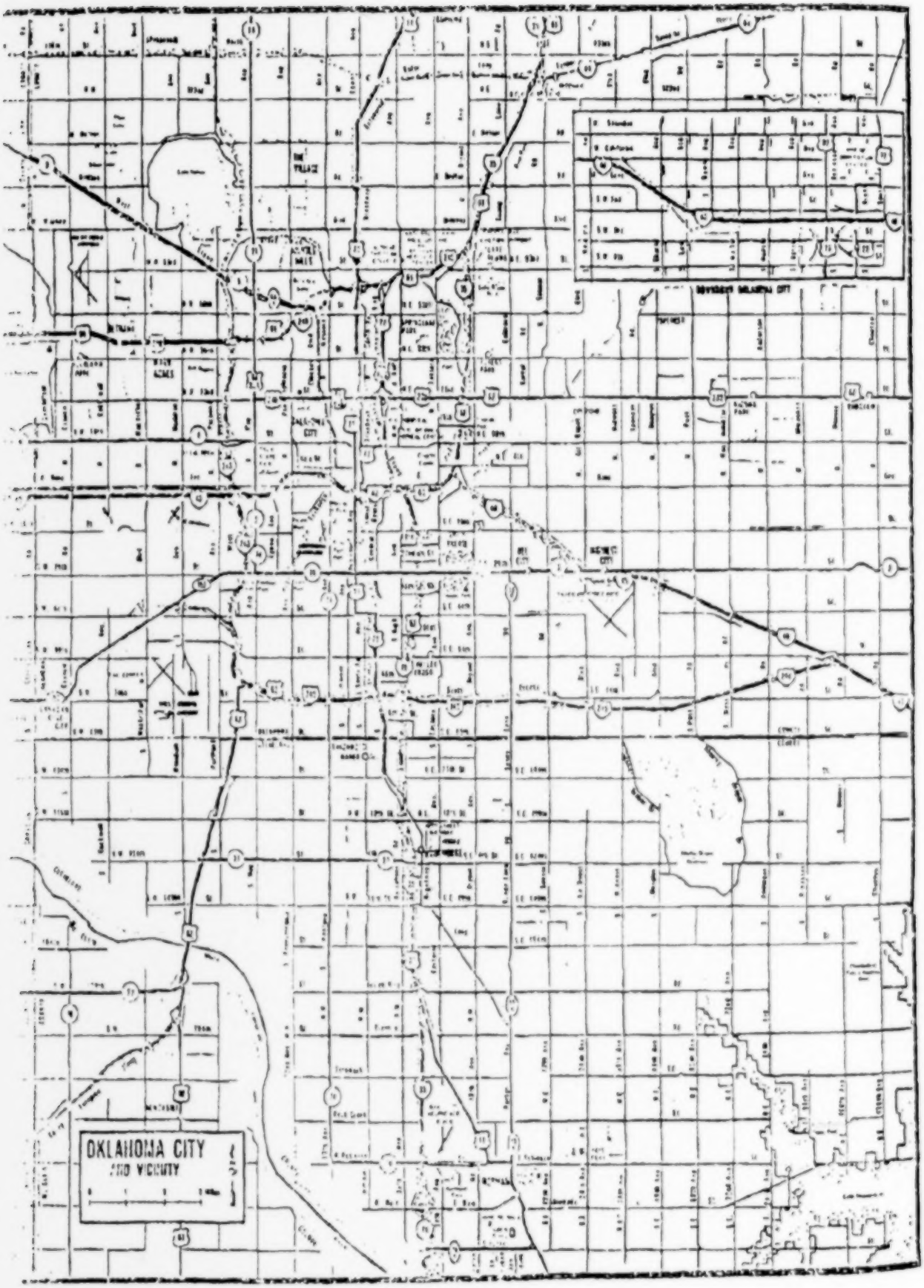
A. P. Theis	Louisiana Dept of Public Works	Baton Rouge, LA
Richard Bennett	Louisiana Dept of Public Works	Alexandria, LA
Forrest Nelson	Consultant to the State of Oklahoma	Norman, OK
Paul R. Wilson	Oklahoma Water Resources Board	Oklahoma City, OK
Ivan M. Stout	Texas Water Development Board	Austin, TX
Robert M. Whitenton	Texas Water Rights Commission	Austin, TX
Americ Bryniarski	Arkansas Dept of Commerce, Division of Soil and Water Resources	Little Rock, AR

Members of Legal Advisory Committee

John F. Gibson, Jr.	Arkansas Soil and Water Conservation Commission	Dermott, AR
Doug Caroom	Assistant Attorney General of Texas	Austin, TX
H. David Smith	Louisiana Dept of Public Works	Baton Rouge, LA
Jim Barnett	Assistant Attorney General of Oklahoma	Oklahoma City, OK

Others Present

Rodger Harris	Corps of Engineers, LMVD	Vicksburg, MS
Fred H. Bayley III	Corps of Engineers, LMVD	Vicksburg, MS
Lawrence N. Flanagan	Corps of Engineers, LMVD	Vicksburg, MS
Elizabeth A. Ayers	Corps of Engineers, LMVD	Vicksburg, MS
Terry Coomes	Corps of Engineers, SWD	Dallas, TX
Paul Seals	Texas Water Quality Board	Austin, TX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MINUTES OF THE 56th MEETING
RED RIVER COMPACT COMMISSION
HILTON INN WEST - OKLAHOMA CITY, OKLAHOMA

28 April 1977

The 56th meeting of the Red River Compact Commission convened at 9:00 a.m. on 28 April 1977, at the Hilton Inn West in Oklahoma City, Oklahoma. An attendance list is inclosed.

Mr. Bayley, acting in absence of the Chairman, opened the meeting by noting that General Koisch would be retiring from active military duty probably by 1 July 1977 and that he was not expected to act again as Division Engineer for the Corps of Engineers, Lower Mississippi Valley Division. Mr. Bayley also expressed his opinion that General Koisch would probably not return again as Chairman of the Red River Compact Commission.

After introductions the minutes of the 55th meeting were read and approved.

In expressing the Chairman's views about the Compact negotiations, Mr. Bayley pointed out the time savings that could be made by forwarding a finalized Draft of the Compact to the Office of Management and Budget and the Department of Justice prior to appointment of a new Federal Chairman.

During opening remarks by the Commissioners, it was indicated that a productive meeting had been held between Mr. Cresap and Mr. Parkey

earlier in Shreveport, Louisiana, and that they were now in agreement on Reach II.

Mr. Parkey, in his initial comments, recommended that the Commissioners pass an appropriate resolution commending General Koisch for his service to the Red River Compact Commission.

Next, Mr. Flanagan discussed changes made in the October 1976 draft as directed at the last meeting. Unresolved items in the Compact were then discussed.

After a lengthy discussion of Section 5.03, Subbasin 3, in Article V-Reach II, it was agreed to delete the word "annual" in the fifth line of subparagraph (b), and add the following subparagraph: "(c) Accounting will be on an annual basis unless otherwise deemed necessary by the States of Arkansas and Oklahoma."

During a discussion of Section 5.05, Mr. Saxton requested that the State of Texas guarantee the State of Arkansas a minimum low flow below Lake Texarkana equal to the historical low flow at the damsite or 100 percent of the runoff below the damsite. It was pointed out to Mr. Saxton that based on existing records the 10 cfs release presently being provided by the reservoir under the Corps of Engineers contracts with Texarkana, Arkansas, and Texarkana, Texas, is more than the historic low flow without the dam. Mr. Parkey stated that the State of Texas did not have the authority to change the operation of Lake Texarkana and

Mr. Bayley pointed out that the 10 cfs was legislatively established and was recognized in the Compact. Mr. Parkey indicated that the people in Texas would not agree to allowing 100 percent of the runoff below Lake Texarkana to flow into Arkansas. After further discussion on this point Mr. Saxton agreed to leave this section as written.

A rewritten version of Section 5.06 was proposed by the States of Louisiana and Texas.

Concerning Article VI-Reach III, it was agreed to change the words "flow at" to "runoff above the" in the 4th line of subparagraph (c) of Section 6.03.

A new version of Section 7.02 of Article VII-Reach IV was submitted by the Attorneys for Arkansas and Louisiana, and after a discussion of the proposed changes, it was agreed to incorporate the rewritten section into the Compact draft. Also, the listed low flows on Boeuf River and Bayou Macon were changed from 15 cfs and 10 cfs respectively to 20 cfs for both streams. Mr. Theis voiced tentative approval of these changes subject to a review by Mr. Cresap. He indicated that they would advise the State of Arkansas of their final acceptance.

In a review of Article XI-Pollution as rewritten by the State of Texas, it was explained that the changes were made to avoid conflicts with

existing Texas state law. The other Commissioners tentatively approved this article subject to a review by their respective states. It was considered that this reveiw could be made within 30 days.

It was recommended by Mr. Nelson that the Compact draft be sent forward for Federal review prior to the next meeting and that Mr. Walter Kietchel of the Department of Justice be invited to the next meeting to discuss any changes they might want to make. It was agreed that all of the changes made at this meeting and any further changes to be made by the states with the exceptions of Article XI would be included in the draft to be forwarded.

Mr. Nelson further recommended that our next meeting be a 2-day session at which interpretive comments are received for the record from each state. Mr. Theis indicated that Louisiana did not consider verbal comments as appropriate for this session since it would only tend to cause more confusion and delays if a new minumderstanding developed.

The Commissioners requested that LMVD office continue with administrative duties associated with the Compact negotiations in the absence of the Federal Chairman.

It was agreed that the next meeting would be on 28 and 29 June 1977 in Dallas, Texas, and that the Southwest Division office would be asked to provide a conference room.

The meeting was adjourned.

56th MEETING
RED RIVER COMPACT COMMISSION
HILTON INN-WEST
Oklahoma City, Oklahoma

28 April 1977

ATTENDANCE LIST

Members of Compact Commission

John P. Saxton	Commissioner	Little Rock, AR
Arthur R. Theis	Acting Commissioner	Baton Rouge, LA
Orville B. Saunders	Commissioner	Altus, OK
Fred Parkey	Commissioner	Iowa Park, TX

Members of Engineering Advisory Committee

Forrest Nelson	Consultant to the State of OK	Norman, OK
Ivan M. Stout	Texas Water Development Board	Austin, TX
Robert M. Whitenton	Texas Water Rights Commission	Austin, TX

Members of Legal Advisory Committee

John F. Gibson, Jr.	Arkansas Soil & Water Conservation Commission	Dermott, AR
Doug Caroom	Assistant Attorney General of Texas	Austin, TX
H. David Smith	Louisiana Dept of Public Works	Baton Rouge, LA
Jim Barnett	Assistant Attorney General of Oklahoma	Oklahoma City, OK

Others Present

Rodger Harris	Corps of Engineers, LMVD	Vicksburg, MS
Fred H. Bayley III	Corps of Engineers, LMVD	Vicksburg, MS
Lawrence N. Flanagan	Corps of Engineers, LMVD	Vicksburg, MS
Paul A. Seals	Texas Water Quality Board	Austin, TX
Garner E. Jones	Texas Water Quality Borad	Austin, TX
J. R. Young	Arkansas Dept of Water Resources	Little Rock, AR
Terry Thurman	Oklahoma Water Resources Board	Oklahoma City, OK
Pat Hestand	Oklahoma Water Resources Board	Oklahoma City, OK

RECEIVED
JUL 18 1977
TEXAS WATER RIGHTS COMMISSION
AUSTIN, TEXAS

MINUTES OF THE 57th MEETING
RED RIVER COMPACT COMMISSION
SWD CORPS OF ENGINEERS OFFICE
DALLAS, TEXAS

29 June 1977

The 57th meeting of the Red River Compact Commission convened at the Southwestern Division office of the U.S. Army Corps of Engineers in Dallas, Texas, on 29 June 1977 at 9:00 a.m. An attendance list is inclosed (Inclosure 1).

Mr. Bayley, acting in the absence of the Chairman, opened the meeting. After introductions, the minutes of the 56th meeting were read and approved subject to a deletion made at the request of the State of Louisiana.

In briefing the Commissioners on the status of the Federal Chairmanship, Mr. Bayley indicated that no word had been received concerning a replacement for General Koisch. Mr. Cresap stated that during the Sabine River Compact negotiations, when the Federal Chairman retired a resolution was passed by the Commissioners making a specific recommendation to the President as to whom they wanted as a replacement. Mr. Cresap suggested, and the other Commissioners agreed, that such a resolution was in order. A resolution and a letter to the President were then prepared requesting that General Marshall be appointed as the next Federal Chairman (Inclosures 2 & 3). The Commissioners agreed to

work through their Congressmen in an effort to expedite the appointment. Mr. Nelson suggested that Mr. Cresap ask Senator Russell Long to take the lead in getting Congressmen from the other states to push for a rapid replacement for General Koisch. In response to a question by Mr. Parkey, Mr. Bayley stated, that in his opinion, General Koisch could still sign the Compact as Federal Chairman even after his retirement from active military service until such time as his request for relief is accepted or a replacement is named.

Concerning the review underway by other Federal agencies, Mr. Bayley informed the Commissioners that the Office of Management and Budget had indicated that review comments on the Compact draft would be forthcoming from both the Departments of Interior and Agriculture. The extent of these comments was unknown. He said the Commissioners would be advised concerning the comments as soon as they were received.

In their initial remarks, all the Commissioners indicated they were essentially ready to sign the Compact, except for Mr. Saxton, who stated he was still having trouble in the Texarkana, Arkansas area.

Next, Mr. Flanagan discussed various changes made in the Compact draft by the Legal Advisory Committee, the Office of Management and Budget, and the Justice Department.

After a lengthy discussion of Section 2.08 it was agreed to leave it as written in the June 1977 draft.

In Section 9.04, wording changes were made to further clarify the extent of Federal expenses associated with administration of the Compact.

Other proposed editorial changes were approved by the Commission.

In Section 5.02, Subbasin 2, in the listing of last downstream major damsites, Lake Bonham, Lake Gibbons, and Rice Lake were deleted because these were not the last major downstream damsites. After consideration of changing the manner of listing the last major downstream damsites, it was agreed to leave the draft as written.

In Sections 5.01 and 5.03, Oklahoma updated storage figures on several of the Oklahoma reservoirs.

In attempting to provide Arkansas with a better idea of anticipated low flows on the mainstem, Mr. Stout presented a compilation of low flow data. In explaining the information he stated that low flow records for 1956 provided the most meaningful data he had at this time.

After discussing Section 5.05, it was agreed to leave that portion of the draft as written.

Mr. Saxton asked for guidance concerning the Arkansas Game and Fish Commission's complaint about the Corps mode of operation of Wright Patman Lake. The concern, as Mr. Saxton understood it, was primarily

water quality because releases were made from the bottom of the lake. Also, there was concern about the actual gate closing procedure. Mr. Saxton said he would send copies of Game and Fish correspondence concerning this matter to Mr. Bayley so the Corps could be more responsive to his questions.

A rewrite of Section 5.06, made by the Legal Advisory Committee, was proposed by Mr. Gibson. A discussion ensued concerning requested additions by Oklahoma of Ward Lake and Raymond Gary Lake to the listing in the Engineering Advisory Report of reservoirs exempt under Section 5.05. Mr. Cresap protested including any reservoir on the list with a conservation storage of more than 1000 acre feet. It was finally agreed to delete Raymond Gary Lake from the listing, and to modify the conservation storage capacity of Ward Lake to show it as less than 1000 acre feet. The Commissioners agreed that no reservoirs listed in the Engineering Advisory Report to be exempt under this section would have a conservation storage capacity of more than 1000 acre feet. Mr. Thurman advised that Raymond Gary Lake actually had no conservation storage and would be exempt anyway. It was further agreed to delete reference to the Engineering Advisory Report in the Compact, and to state that reservoirs with a conservation storage of 1000 acre feet or less would be exempt from provisions of Section 5.05.

Suggested changes by the Legal Advisory Committee in the wording of Reach III were approved by the Commissioners. The changes, which

added a new subbasin, were necessary to define the Louisiana portion of the streams in this Reach. Similar changes were made on Reach IV to include that portion of the basin above the last major downstream damsites in Arkansas.

The States of Oklahoma, Louisiana, and Arkansas indicated their respective states had concurred in changes made at the last meeting in Article XI-Pollution.

The Commissioners then agreed they were satisfied with the wording of the draft and that a copy of the finalized Compact should be prepared and distributed for their use.

In discussing the Legal Advisory Committee's proposed interpretive comments, the Commissioners decided to take them home for review. It was thought that any differences could be worked out by telephone.

It was determined that the next meeting, which will be a signing ceremony, would be held at Lake Texoma and hosted jointly by the States of Texas and Oklahoma. The date of 11 August 1977 was tentatively set.

Mr. Caroom indicated he would complete and circulate to the Commissioners for approval, a resolution commending General Koisch for his service to the Commission.

Mr. Bayley stated that the Corps would print the final Compact and supplements. Mr. Thurman agreed to work with Mr. Flanagan to get this accomplished.

The meeting was adjourned.

57th MEETING
RED RIVER COMPACT COMMISSION
SWD OFFICE, U.S. ARMY CORPS OF ENGINEERS
DALLAS, TEXAS

29 June 1977

ATTENDANCE LIST

Members of Compact Commission

John P. Saxton	Commissioner	Little Rock, AR
Daniel V. Cresap	Commissioner	Baton Rouge, LA
Orville B. Saunders	Commissioner	Altus, OK
Fred Parkey	Commissioner	Iowa Park, TX

Members of Engineering Advisory Committee

Paul Wilson	Oklahoma Water Resources Board	Oklahoma City, OK
Forrest Nelson	Consultant to the State of OK	Norman, OK
Ivan M. Stout	Texas Water Development Board	Austin, TX
Robert M. Whitenton	Texas Water Rights Commission	Austin, TX
Arthur R. Theis	LA Dept of Transportation & Dev Office of Public Works	Baton Rouge, LA
Americ Bryniarski	AR Dept of Commerce, Division of Soil & Water Resources	Little Rock, AR

Members of Legal Advisory Committee

John F. Gibson, Jr.	Arkansas Soil & Water Conservation Commission	Dermott, AR
Doug Caroom	Asst Attorney General of Texas	Austin, TX
H. David Smith	LA Dept of Public Works	Baton Rouge, LA
Jim Barnett	Asst Attorney General of Oklahoma	Oklahoma City, OK

Others Present

Rodger Harris	Corps of Engineers, LMVD	Vicksburg, MS
Fred H. Bayley III	Corps of Engineers, LMVD	Vicksburg, MS
Lawrence N. Flanagan	Corps of Engineers, LMVD	Vicksburg, MS
Terry Coomes	Corps of Engineers, SWD	Dallas, TX
Paul A. Seals	Texas Water Quality Board	Austin, TX
Terry Thurman	Oklahoma Water Resources Board	Oklahoma City, OK
Larry Bailey	Texas Water Quality Board	Austin, TX
Mr. & Mrs. William A. Bryan	Texarkana Water Utilities	Texarkana, AR & TX

R E S O L U T I O N

Be it resolved by the Red River Compact Commission that appropriate action should be taken to replace Major General Francis P. Koisch as Federal Chairman, Red River Compact Commission, who is retiring from Federal Service and has submitted his resignation to the President of the United States

Be it further resolved that in order to maintain continuity and to effect a final Compact that Major General Robert C. Marshall, Division Engineer, Lower Mississippi Valley Division, Corps of Engineers, U.S. Army, be recommended to the President of the United States as the Federal Chairman, whereas the Commission shall transmit to the President, its unanimous recommendation of General Marshall to the President and that each Commissioner shall contact their Congressional delegation to promote early action on this matter.

29 June 1977

The President
The White House
Washington, DC 20500

Dear Mr. President:

It is our understanding that Major General F. P. Koisch, Federal Chairman, Red River Compact Commission, has written you requesting that he be relieved from duty. General Koisch is retiring from Federal Service on 30 June 1977.

General Koisch and other Army Officers have been instrumental in aiding the four states in arriving at the almost complete Compact.

The Draft Compact is being coordinated with the Office of Management and Budget and the Department of Justice. OMB is coordinating the draft with other Federal agencies and we expect to receive comments very soon.

For many years, the Federal Chairman has been the Corps of Engineers General Officer, located in Vicksburg, Mississippi. In accordance with Public Law 346 (84th Congress) and in order to maintain continuity in effecting the Compact, the Commissioners from the four States of Arkansas, Louisiana, Oklahoma, and Texas, recommend that you appoint Major General Robert C. Marshall to replace General Koisch as Chairman, Red River Compact Commission.

Respectively request that early action be taken on this matter.

Respectfully yours,

Arkansas Department of Commerce
ATTN: John P. Saxton, Director
Division of Soil & Water Resources
1818 West Capitol, Bldg. A
Little Rock, Arkansas 72201

Daniel V. Cresap, Assistant Director
Louisiana Dept. of Public Works
P. O. Box 44155, Capitol Station
Baton Rouge, Louisiana 70804

Orville B. Saunders
Red River Compact Commissioner
for Oklahoma
Drawer V
Altus, Oklahoma 73521

Fred Parkey, Interstate Compact
Commissioner for the Red River
105 West Washington
Iowa,Park, Texas 76367

ARTICLE IX

ADMINISTRATION OF THE COMPACT

Section 9.01. There is hereby created an interstate administrative agency to be known as the "Red River Compact Commission," hereinafter called the "Commission." The Commission shall be composed of two representatives from each Signatory State who shall be designated or appointed in accordance with the laws of each State, and one Commissioner representing the United States, who shall be designated or appointed by ~~appropriate Federal authority~~ the President. The Federal Commissioner shall be the Chairman of the Commission but shall not have the right to vote. The failure of the United States to designate or appoint a Federal Commissioner will not prevent the operation or effect of this compact, and the eight representatives from the Signatory States will elect a Chairman for the Commission, who is not a federal officer and not a member of the Commission.

Section 9.02. The Commission shall meet and organize within sixty days after the effective date of this Compact. Thereafter, meetings shall be held at such times and places as the Commission shall decide.

Section 9.03. Each of the two Commissioners from each state shall have one vote; provided, however, that if only one representative from a state attends he is authorized to vote on behalf of the absent Commissioner from that state. Representatives from three states shall constitute a quorum. Any action concerned with administration of this Compact or any action requiring compliance with specific terms of

this Compact shall require six concurring votes. If a proposed action of the Commission affects existing water rights in a state, and that action is not specifically provided for in this Compact, eight concurring votes shall be required.

Section 9.04.

(a) The salaries and personal expenses of each state's representative shall be paid by the government that it represents.

(b) Expenses for any additional stream flow gauging stations shall be equitably apportioned by the Commission among the states involved in the reach in which the stream flow gauging stations are located.

(c) All other expenses of the Commission which are not paid by the United States shall be borne equally by the Signatory States and shall be paid by the Commission out of the "Red River Compact Commission Fund." Such fund shall be inititated and maintained by equal payments of each state into the fund. Disbursement shall be made from the fund in such manner as may be authorized by the Commission. Such fund shall not be subject to audit and accounting procedures of the state; however, all receipts and disbursements of the fund by the Commission shall be audited by a qualified independent public accountant at regular intervals, and the report of such audits shall be included in and become a part of the annual report of the Commission. Each state shall have the right to make its own audit of the accounts of the Commission at any reasonable time.

ARTICLE X

POWERS AND DUTIES OF THE COMMISSION

Section 10.01. The Commission shall have the power to:

(a) Adopt rules and regulations governing its operation and the enforcement of the terms of the Compact;

(b) Establish and maintain an office for the conduct of its affairs and, if desirable, from time to time, change its location;

(c) Employ or contract with such enginerring, legal, clerical and other personnel as it may determine necessary for the exercise of its functions under this Compact without regard to the Civil Service Laws of any Signatory State; provided that such employees shall be paid by and be responsible to the Commission and shall not be considered employees of any Signatory State;

(d) Acquire, use and dispose of such real and personal property as it may consider necessary;

(e) Enter into contracts with appropriate State or Federal agencies for the collection, correlation and presentation of factual data, for the maintenance of records and for the preparation of reports;

(f) Secure from the head of any department or agency of the Federal or State government with compensation as required such information as it may need or deem to be useful for carrying out its functions and as may be available to or procurable by the department or agency to which the request is addressed;

RECEIVED
JUL 18 1977
TEXAS WATER RIGHTS COMM
AUSTIN, TEXAS

United States Water Resources Council

1975 WATER ASSESSMENT

ARKANSAS-WHITE-RED, RIO GRANDE, TEXAS GULF REGIONS
STUDY DIRECTOR'S OFFICE - P.O. BOX 252, ALBUQUERQUE, NEW MEXICO 87103
(PHONE 505-766-2184)

July 7, 1977

Mr. Fred H. Bayley III
Chief, Planning Division
Lower Mississippi Valley Division
Corps of Engineers
Vicksburg, Mississippi 39180

Dear Mr. Bayley:

Mr. Robert Sanchez has referred your request of June 17, 1977 for comments on the Red River Compact Draft to me for reply.

The proposed 60%-40% division of runoff between Texas and Oklahoma to the runoff of the North Fork of the Red River would have a depletion effect upon the inflow to Lake Altus; and, hence, the delivery of water to the W.C. Austin project. We recommend additional consideration for protection of the W.C. Austin project water supply. In Section 4.05 there is proposed restriction of development of the North Fork of the Red River water supply within Texas above Altus Reservoir until imported water is provided to meet irrigation and municipal needs of western Oklahoma or until January 1, 2000, whichever occurs first. The W.C. Austin project was completed in 1949. The project was justified for Federal construction on 100-year benefits accruing to the region and the nation. It is recommended that the project water supply be protected to realize the anticipated national benefits.

The compact is not definitive as to whether the states of Oklahoma and Texas may modify, consolidate, or enlarge existing storage in playa lakes. It would appear prudent to have some clarification about the propriety for modification of natural playa lake storage.

The proposed compact specifies the division of waters between states on a percentage basis. There is no specification for delivery of the downstream states' allocated water supply. Minimum flows related to the natural runoff should be specified to protect environmental, fishery, and wildlife resources.

The language in Article XIII conflicts with that in Section 2.07. Article XIII seems to go further in relinquishing rights of the United States than has ever been granted in other similar compacts. We suggest revision of Article XIII to be compatible with Section 2.07.

Sincerely,

K.B. Schroeder
Planning Officer

cc:
Robert Sanchez, Denver, Colorado
Roy Wood, Atlanta, Georgia

Approved
2-16-78

DRAFT
15 Aug 77

MINUTES OF THE 58th MEETING
RED RIVER COMPACT COMMISSION
AIRPORT MARINA HOTEL
DALLAS-FORT WORTH AIRPORT

11 August 1977

The 58th meeting of the Red River Compact Commission convened at the Airport Marina Hotel, Dallas-Fort Worth Airport, on 11 August 1977 at 1:45 p.m. An attendance list is inclosed (Inclosure 1).

In opening the meeting, General Marshall indicated that his appointment as Federal Chairman of the Red River Compact Commission was not yet official, but he would act in that role unless the Commissioners objected. There were no objections.

After introductions the minutes of the 57th meeting were read and approved.

During opening remarks by the Commissioners, Mr. Cresap stated that there were still a few details that needed to be worked out with Arkansas, but hopefully they would be ready to sign the Compact after that. He further indicated that this would probably be his last meeting as Commissioner for Louisiana as he was planning to retire from state service at the end of August.

Mr. Parkey and Mr. Nelson, speaking on behalf of Mr. Saunders who was absent, indicated that both Texas and Oklahoma were ready to accept the Compact as written.

A delegation from Arkansas, that wanted to propose changes to the Compact, was then introduced by Mr. Saxton. He advised the other Commissioners that the Arkansas Water Commission had instructed him not to sign the Compact until this group's proposal was considered.

Next, Mr. Flanagan made a brief presentation showing how the basin was subdivided into reaches for purposes of negotiation. He also explained how the water in Reaches I and II was apportioned under the present draft.

The concerns of the Red River Commission with the present Compact draft were then presented by Mr. Stroud. He pointed out that the ultimate goal of the Commission was to have a navigation project constructed to Index, Arkansas. He proposed that the same wording concerning the assurances of 1000 cfs provided Louisiana in Section 5.05(b) also apply at the Arkansas-Texas state boundary.

Mr. Gilliland then read a letter to General Marshall from Paul Adams, Executive Director of the Arkansas Waterways Commission, in general support of Mr. Stroud's proposal.

During the ensuing discussion it was pointed out to the Arkansas delegation that the 1000 cfs assurance at the Louisiana-Arkansas state boundary was not necessarily for navigation and that all three upstream states had agreed to share the responsibility of providing the water.

It was also noted that by moving the 1000 cfs assurance up to the Arkansas-Texas state boundary, Arkansas would not be sharing the burden of providing low flows to Louisiana. Mr. Nelson and Mr. Parkey maintained that provision of navigation flow was a Federal responsibility and that the Federal Government would provide required storage if a navigation project was built. After discussion of various possible modifications to Mr. Stroud's proposal, no agreement was reached.

A statement was then made by Mr. McRae expressing concern over the reduction of yield in Millwood Reservoir which would occur with full implementation of the Compact as presently written. He stated that about a 12 percent reduction in the present 265 mgd yield would occur. He indicated that the water district was searching for a solution to the problem and asked that the Commissioners give it full consideration. Mr. McRae said he had filed an objection to reducing the Millwood Reservoir yield with the Arkansas Water Commission.

Mr. Caroom pointed out that based on a Supreme Court decision, the State of Arkansas would not be required to reimburse the water district for the reduced yield. He further stated that in water disputes with Oklahoma the State of Texas had steadfastly maintained that construction of a Federal project such as Millwood Reservoir did not give owners of the project a right to the yield of the entire basin.

Mr. McRae said that the Corps of Engineers, Tulsa District, was making a study to determine what additional storage would be needed to sustain the 265 mgd under compacted conditions. The study would also determine the percentage of time the 265 mgd yield would be available. He hoped to have this information available for dissemination by 15 September.

A motion was made by Mr. Saxton that wording be included in the Compact that would give Arkansas the same assurances at the Arkansas-Texas state boundary that Louisiana had at the Louisiana-Arkansas state boundary, except that flow values would be changed from 3000 cfs and 1000 cfs to 2400 cfs and 800 cfs respectively. It was further stated in the motion, that the provision would not come into effect until navigation actually existed on the river, and that during the low flow conditions Arkansas would also be required to pass all undesignated flows and weekly runoff originating in Subbasin 5 like Texas and Oklahoma. The motion was not seconded and failed.

Mr. Cresap then made the motion that a study be undertaken to determine a satisfactory minimum flow at Index and the relationship of this flow to that at the Louisiana-Arkansas state boundary. This minimum flow would then be considered by the Commissioners for inclusion in the Compact. The motion was approved but an agreement was not reached on who would or could do the study. Mr. Stout advised that he had attempted such a study and did not have enough basic data. After

further discussion of the proposed study, the Chairman advised the Commissioners he would not initiate action on the motion. He then asked Arkansas to draft language they would be satisfied with and sent it to him for distribution to the other Commissioners.

Mr. Parkey said that if the Compact was not agreed upon in about 3 months he would propose a two state Compact between Oklahoma and Texas.

The meeting was adjourned.

58th MEETING
RED RIVER COMPACT COMMISSION
AIRPORT MARINA HOTEL
DALLAS-FORT WORTH AIRPORT

11 August 1977

ATTENDANCE LIST

Members of Compact Commission

MG Robert C. Marshall	Acting Federal Chairman	Vicksburg, MS
John P. Saxton	Commissioner	Little Rock, AR
Daniel V. Cresap	Commissioner	Baton Rouge, LA
Fred Parkey	Commissioner	Iowa Park, TX

Members of Engineering Advisory Committee

Paul Wilson	OK Water Resources Board	Oklahoma City, OK
Forrest Nelson	Consultant to the State of OK	Norman, OK
Ivan M. Stout	Texas Water Development Board	Austin, TX
Robert M. Whitenton	Texas Water Rights Commission	Austin, TX
Arthur R. Theis	LA Dept of Transportation & Dev., Office of Public Works	Baton Rouge, LA

Members of Legal Advisory Committee

John F. Gibson, Jr.	Arkansas Soil & Water Conservation Committee	Dermott, AR
Doug Caroom	Asst Attorney General of TX	Austin, TX
H. David Smith	LA Dept of Transportation & Dev., Office of Public Works	Baton Rouge, LA
Jim Barnett	OK Water Res Board	Oklahoma City, OK

Others Present

Fred H. Bayley III	Corps of Engineers, LMVD	Vicksburg, MS
Lawrence N. Flanagan	Corps of Engineers, LMVD	Vicksburg, MS
Terry Coomes	Corps of Engineers, SWD	Dallas, TX
Paul A. Seals	Texas Water Quality Board	Austin, TX
Larry Bailey	Texas Water Quality Board	Austin, TX
Terry Thurman	Oklahoma Water Res Board	Oklahoma City, OK
Mrs Fred Parkey		Iowa Park, TX
Jack Williams	Arkansas Governors Office	Little Rock, AR
John Stroud	Red River Commission, Attorney	Texarkana, AR
Jim Bird	Red River Commission	Texarkana, AR
Bruce McRae	S.W. Regional Water Dist	Texarkana, AR
L. E. Gilliand	Arkansas Waterways Comm	Texarkana, AR

DRAFT

MINUTES OF THE 59th MEETING

RED RIVER COMPACT COMMISSION

HILTON INN

BOSSIER CITY, LOUISIANA

16 February 1978

The 59th meeting of the Red River Compact Commission convened at 2 p.m. at the Hilton Inn, Bossier City, Louisiana, on 16 February 1978. An attendance list is inclosed (Incl 1).

Mr. Fred Bayley opened the meeting in absence of the Federal Chairman, General R. C. Marshall.

After introductions, the minutes of the 58th meeting were read and approved.

During opening remarks, each State Commissioner expressed his thoughts that the best possible compromise on an equitable apportionment of water of the Red River had been reached. Mr. Fred Parkey then provided copies of a Certificate of Appreciation for General Koisch, past Federal Chairman. Mr. Parkey stated that he would see that the certificate was delivered to General Koisch.

Mr. Bayley advised the group that official Federal comments on the Compact draft had not been received. He further explained that as a result of several telephone conversations with OMB personnel, he expected only one comment, which would be on Section 9.01 of the Compact draft. The comment would provide for appointment of the Federal

Chairman by the President instead of appointment or designation by the appropriate Federal authority. Mr. Bayley indicated that this change had already been made in the February 1978 draft in anticipation that there would be no disagreement by the four states. No disagreement was voiced.

It was agreed that after a discussion of the various changes that had been made to the previous draft, each page of the draft would be initialled by the four State Commissioners. Mr. Saxton stated that his initials would signify his agreement with the draft, but that the Arkansas Water Commission, which is scheduled to meet on 1 March 1978, would have to give official approval for the State of Arkansas. He agreed to officially contact each Commissioner after that meeting.

Mr. Flanagan then began a discussion of changes that had been made to the July 1977 draft. Mr. Theis proposed a change in the wording of Section 2.08; however, after objection from Texas, the paragraph was left as previously written.

During a discussion of Section 5.05, a rewrite of paragraph 5.05(d) was proposed by the Legal Advisory Committee. This change which also renumbered and rearranged paragraphs 5.05(c) and 5.05(d) was approved. Also, the deletion of the phrase "and subject to provisions of Section 5.05(d)" at the end of paragraph 5.05(b)(1) was approved.

In Section 7.03, paragraph (b) it was pointed out that flows designated for Bayou Bartholomew, Boeuf River and Bayou Macon had been changed from 42 cfs, 20 cfs, and 20 cfs to 80 cfs, 40 cfs, and 40 cfs respectively.

After discussing several other editorial changes, the draft was approved.

In discussing the interpretive comments, it was pointed out that Louisiana had proposed changes to the August 1977 draft. It was decided that the Legal Advisory Committee would meet in an attempt to reach agreement on wording of that document, and report back to the Commission.

Mr. Thurman advised the group that most of the work on the Engineering Advisory Report was complete and that it could be finished in a short period of time.

During concluding remarks, Mr. Parkey proposed, and it was agreed, that Mr. Smith, Legal Advisor for Louisiana, would write a resolution pertaining to the services of Mr. Cresap to the Red River Compact Commission. This would be passed around to the Commissioners for signature and be presented to Mr. Cresap at the appropriate time.

A date for the signing ceremony was to be worked out at a later time. It was agreed that the first week of May would be preferable.

After adjournment of the meeting, the draft was initialled by each State Commissioner.

59th MEETING
RED RIVER COMPACT COMMISSION
BOSSIER CITY, LOUISIANA

16 February 1978

ATTENDANCE LIST

Members of Compact Commission

John P. Saxton	Commissioner	Little Rock, AR
Arthur R. Theis	Commissioner	Baton Rouge, LA
Fred Parkey	Commissioner	Iowa Park, TX
Orville B. Saunders	Commissioner	Altus, OK

Members of Engineering Advisory Committee

Paul Wilson	OK Water Resources Board	Oklahoma City, OK
Robert M. Whitenton	Texas Dept. of Water Resources	Austin, TX
Richard Bennett	LA Dept. of Transportation & Dev., Office of Public Works	Alexandria, LA
Americ Bryniarski	AR Dept. of Commerce	Little Rock, AR

Members of Legal Advisory Committee

John F. Gibson, Jr.	Arkansas Soil & Water Conservation Commission	Dermott, AR
Doug Caroom	Asst Attorney General of TX	Austin, TX
H. David Smith	LA Dept of Transportation & Dev., Office of Public Works	Baton Rouge, LA

Others Present

Fred H. Bayley III	Corps of Engineers, LMVD	Vicksburg, MS
Lawrence N. Flanagan	Corps of Engineers, LMVD	Vicksburg, MS
Herbert A. Kassner	Corps of Engineers, LMVD	Vicksburg, MS
Terry Coomes	Corps of Engineers, SWD	Dallas, TX
Terry Thurman	Oklahoma Water Res Board	Oklahoma City, OK
B.A. Lemser	Red River Valley Assoc.	Texas
Sam Spearman	N.E. Texas Economic Dev District	Texarkana, TX
William A. Bryan	Texarkana Water Utilities	Texarkana, TX
Charles McCauley	Shreveport Times	Shreveport, LA
Bill Upshaw	Shreveport Times	Shreveport, LA

Minutes of the 60th Meeting
Red River Compact Commission
Lake Texoma Lodge and Denison Dam

12 May 1978

The 60th meeting of the Red River Compact Commission which culminated in a formal signing of the compact on Denison Dam, was held at the Lake Texoma Lodge on 12 May 1978.

General Robert C. Marshall, Federal Chairman, called the meeting to order at 9:30 a.m. After giving a brief history of the Red River Compact Commission, the Chairman gave special recognition of past members who had served over the years. He then presented a Certificate of Appreciation to Dan Cressap who had recently retired as Louisiana's Commissioner.

Next, each Commissioner introduced special guests from his state. Remarks were made by various State officials, including Harvey Davis, Executive Director, Texas Department of Water Resources; Gerald Borelli, Chairman, Oklahoma Water Resources Board; and William Stringfellow, Director, Arkansas Department of Commerce. The group then traveled to Denison Dam where each of the Commissioners signed the Compact. The meeting was adjourned shortly thereafter.

Minutes of 61st Meeting

Red River Compact Commission

Holiday Inn South - Dallas, Texas

19 September 1979

The 61st meeting of the Red River Compact Commission convened at the Holiday Inn South Motel, Dallas, Texas, at 1:30 p.m. on September 19, 1979. An attendance list is inclosed (Incl 1).

Major General Robert C. Marshall, Federal Chairman, opened the meeting with introduction of those present. Minutes of the 60th meeting were then read and approved after which opening comments were made by each commissioner. During his remarks, the Chairman outlined the process by which the Compact and draft ratifying legislation would be forwarded through OMB to the President. A discussion ensued concerning sponsorship of the Compact by state representatives and senators. David Smith, Legal Advisor for Louisiana, stated that Senator Long would introduce a bill in the Senate. The Chairman stated that, after OMB review and approval, the President would send the legislation to both the House and Senate. All of the commissioners agreed to work through their respective Congressional delegations to gain support for the legislation.

Mr. Nelson, newly appointed commissioner for Texas, expressed his appreciation to Mr. Parkey and other advisors for their support and consultation in providing him background information on Commission matters. All of the commissioners indicated that the Compact had been ratified by their state legislatures and that they were ready to move toward Congressional approval.

Next, the Chairman presented a Certificate of Appreciation to Mr. Fred Parkey, outgoing commissioner from Texas, for his service to the Red River Compact Commission.

Motions were then made and approved naming Paul Wilson and Doug Caroom as new chairmen of the Engineering and Legal Advisory Committees respectively, replacing Forrest Nelson and John Gibson. John Gibson advised the group that, although he wanted to step down as Chairman, he would remain as legal advisor for Arkansas.

In a report of the Legal Advisory Committee to the Commission, John Gibson indicated that his committee had drafted Congressional ratifying legislation. He then explained the four sections of that document. The Committee agreed to make minor corrections to the draft before its finalization. The corrected draft would be forwarded to the Chairman.

The Legal Advisory Committee also advised the commissioners that they were in agreement on the "Interpretive Comments" document and signed a signature page indicating formal submission to the Commission. A motion was made and approved that the "Interpretive Comments" be accepted and approved by the Commission. It was agreed that the Chairman would sign below the signatures of the legal advisors certifying approval by the Commission.

Next, a discussion developed concerning appointment of the Federal Representative. It was suggested by Mr. Saxton that the Compact legislation name the Corps of Engineers as the Federal Agency from which the Federal Chairman is appointed. It was agreed that this would not be appropriate and, the best course of action would be to express, in the

form of a resolution, appreciation to the President for making the services of the Corps available in the past. A motion was made and approved to that effect. It was decided that future desires of the commissioners for a specific Federal Chairman could best be expressed to the President through the appropriate Congressmen.

A recess was then called to allow resolution of comments on the Engineering Advisory Committee report recently made available by the State of Louisiana. After the recess, Mr. Wilson advised the group that there had not been sufficient time to resolve all of the comments but that no major problems were expected. In order to avoid having another meeting to approve the Engineering Advisory Committee report, a motion was made and approved that the Chairman would be notified by telephone of individual commissioner approval after the report was finalized. It was requested that upon completion of the report draft, priority treatment be given to printing the final document.

Next, the Chairman reminded the commissioners that the Compact requires two commissioners from each state and a meeting within sixty days after the effective date of the Compact.

Mr. Theis stated his desire that the Caddo Lake Compact be submitted by the Red River Compact Commission Chairman with the Red River Compact as a companion document. After a brief disucssion of this matter, the Chairman advised that he could not forward the Caddo Lake Compact because there had been no Federal review; however, he indicated that he would note the existence of the Caddo Lake Compact in his report forwarding the

Red River Compact, and make the statement that there is no conflict between the Caddo Lake and Red River Compacts.

The meeting adjourned at 3:45 p.m.

SUBBASIN 1
SUBBASIN 2
SUBBASIN 4
REACH II
RED RIVER COMPACT C
ENGINEERING ADVISORY
CIV-07-0045-HE
DEFENDANTS'
EXHIBIT 3

REPORT OF THE

ENGINEERING ADVISORY COMMITTEE

TO THE

RED RIVER COMPACT COMMISSION

MAY 12, 1978

PURPOSE AND APPROVAL

The purpose of this report is to graphically present the boundaries of the Red River Basin and the boundaries of each of the Five Reaches and the respective subbasins in each of the reaches as described in the Red River Compact and to list the reservoirs in Reach II, Subbasin 5 as required by Section 5.06 of the Red River Compact. It is intended that this report will supplement the Compact, and in the event of conflict, the text of the Compact shall govern.

Americ J. Bryniarski
Arkansas Member

Richard L. Bennett
Louisiana Member

Paul R. Wilson
Oklahoma Member

Robert M. Whitenton
Texas Member

R. Terry Coomes
Federal Member

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DESCRIPTION OF RED RIVER BASIN

Article III, Section 3.01(c) of the Red River Compact defines the Red River Basin as:

> "all of the natural drainage area of the Red River and its tributaries east of the New Mexico-Texas State Boundary and above its junction with Atchafalaya and Old Rivers."

Figure 1 graphically illustrates the Red River Basin and its location as related to the Signatory States.

Because of the different hydrologic characteristics between the headwaters and mouth of the Red River basin and for the purposes of apportionment of the water of the Red River Basin, Article II, Section 2.12, divides the Red River Basin into the following five reaches:

(a) Reach I - the Red River and tributaries from the New Mexico-Texas State Boundary to Denison Dam;

(b) Reach II - the Red River from Denison Dam to the point where it crosses the Arkansas-Louisiana State Boundary and all tributaries which contribute to the flow of the river within this reach;

(c) Reach III - the tributaries west of the Red River which cross the Texas-Louisiana State Boundary, the Arkansas-Louisiana State Boundary, and those which cross both the Texas-Arkansas State Boundary and the Arkansas-Louisiana State Boundary;

(d) Reach IV - the tributaries east of the Red River in Arkansas which cross the Arkansas-Louisiana State Boundary; and

(e) Reach V - that portion of the Red River and tributaries in Louisiana not included in Reach III or in Reach IV."

The June 1970 Report of the Engineering Advisory Committee to the Red River Compact Commission contains detailed stream flow and other hydrologic data and water resource development and planning data, which were used extensively during negotiations. Information presented in the 1970 Report was revised and supplemented during negotiations as new information became available and by changed compact concepts.

REACH I

Article II, Section 2.12(a) of the Red River Compact defines Reach I as:

> "the Red River and tributaries from the New Mexico-Texas State Boundary to Denison Dam;"

Article IV of the Compact, Apportionment of Water-Reach I, divides Reach I into four topographical subbasins for the purpose of allocating the water therein. These four subbasins are:

> Subbasin 1 - Interstate Streams - Texas. This includes the Texas portion of Buck Creek, Sand (Lebos) Creek, Salt Fork Red River, Elm Creek, North Fork Red River, Sweetwater Creek, and Washita River, together with all their tributaries in Texas which lie west of the 100th Meridian.
>
> Subbasin 2 - Intrastate and Interstate Streams - Oklahoma. This subbasin is composed of all tributaries of the Red River in Oklahoma and portions thereof upstream to the Texas-Oklahoma State Boundary at longitude 100 degrees west, beginning from Denison Dam and upstream to and including Buck Creek.
>
> Subbasin 3 - Intrastate Streams - Texas. This includes the tributaries of Red River in Texas, beginning from Denison Dam and upstream to and including Prairie Dog Town Fork Red River.
>
> Subbasin 4 - Mainstem of the Red River and Lake Texoma. This subbasin includes all of Lake Texoma and the Red River beginning at Denison Dam and continuing upstream to the Texas-Oklahoma State Boundary at longitude 100 degrees west.

Figure 2 graphically illustrates the location of each of the four subbasins in Reach I. Table A contains pertinent data on Denison Dam.

TABLE A

MAINSTEM RESERVOIRS IN REACH I

DENISON DAM - LAKE TEXOMA
RED RIVER

Feature	Elevation (M.S.L.)	Area (Acres)	Capacity (Acre-Feet)
Top of dam	670.0	---	---
Top of Flood Control Pool	640.0	144,000	5,312,300 (1)
Top of Power Pool	617.0	88,000	2,643,300 (1)
Bottom of Power Pool	590.0	43,100	1,031,300
Power Storage	590.0.617.0	---	1,612,000
Flood Control Storage	617.0.640.0	---	2,669,000 (2)

(1) Excludes inactive storage in Cumberland pool
(2) Includes 22,100 acre-feet for water supply (21.2 m.g.d. yield).

SOURCE: U.S. Army Corps of Engineers
Tulsa District
1 June 1977

NOTE: Lake data based on 1969 sedimentation survey

REACH I
RED RIVER COMPACT COMMISSION
ENGINEERING ADVISORY COMMITTEE REPORT

REACH II

Article II, Section 2.12(b) of the Red River Compact defines Reach II as:

> "the Red River from Denison Dam to the point where it crosses the Arkansas-Louisiana State Boundary and all tributaries which contribute to the flow of the river within this reach;"

Article V of the Compact, Apportionment of Water-Reach II, divides Reach II into five topographic subbasins for the purpose of allocating the water therein. These five subbasins are:

Subbasin 1 - Intrastate Streams - Oklahoma. This subbasin includes those streams and their tributaries above existing, authorized or proposed last downstream major damsites, wholly in Oklahoma and flowing into Red River below Denison Dam and above the Oklahoma-Arkansas state boundary. These streams and their tributaries with existing, authorized or proposed last downstream damsites are as follows:

STREAM	SITE	AC-FT(1)	LATITUDE	LONGITUDE
Island Bayou	Albany	85,200	33°51.5'N	96°11.4'W
Blue River	Durant	147,000	33°55.5'N	96°04.2'W
Boggy River	Boswell	1,243,000	34°01.6'N	95°45.0'W
Kiamichi River	Hugo	240,700(2)	34°01.0'N	95°22.6'W

Subbasin 2 - Intrastate Streams - Texas. This subbasin includes those streams and their tributaries above existing authorized or proposed last downstream major damsites wholly in Texas and flowing into Red River below Denison Dam and above the Texas-Arkansas state boundary. These streams and their tributaries with existing, authorized or proposed last downstream major damsites are as follows:

STREAM	SITE	AC-FT	LATITUDE	LONGITUDE
Shawnee Creek	Randall Lake	5,400	33°48.1'N	96°34.8'W
Brushy Creek	Valley Lake	15,000	33°38.7'N	96°21.5'W

(1) Conservation Storage Capacity
(2) Including Clayton and Tuskahoma Lakes
Source: U.S. Army Engineers, Tulsa District
Tulsa District Water Supply 1 July 1979

(continued)

Subbasin 2 - (continued)

STREAM	SITE	AC-FT (1)	LATITUDE	LONGITUDE
Bois D'Arc Creek	New Bonham Reservoir	130,600	33°42.9'N	95°58.2'W
Coffee Mill Creek	Coffee Mill Lake	8,000	33°44.1'N	95°58.9'W
Sandy Creek	Lake Crockett	3,900	33°44.5'N	95°55.5'W
Sanders Creek	Pat Mayse	124,500	33°51.2'N	95°32.9'W
Pine Creek	Lake Crook	11,011	33°43.7'N	95°34.0'W
Big Pine Creek	Big Pine	138,600	33°52.0'N	95°11.7'W
Pecan Bayou	Pecan Bayou	625,000	33°41.1'N	94°58.7'W
Mud Creek	Liberty Hill	97,700	33°33.0'N	94°29.3'W
Mud Creek	KVW Ranch Lakes (3)	3,440	33°34.8'N	94°27.3'W

Subbasin 3 - Interstate Streams - Oklahoma and Arkansas. This subbasin includes Little River and its tributaries above Millwood Dam.

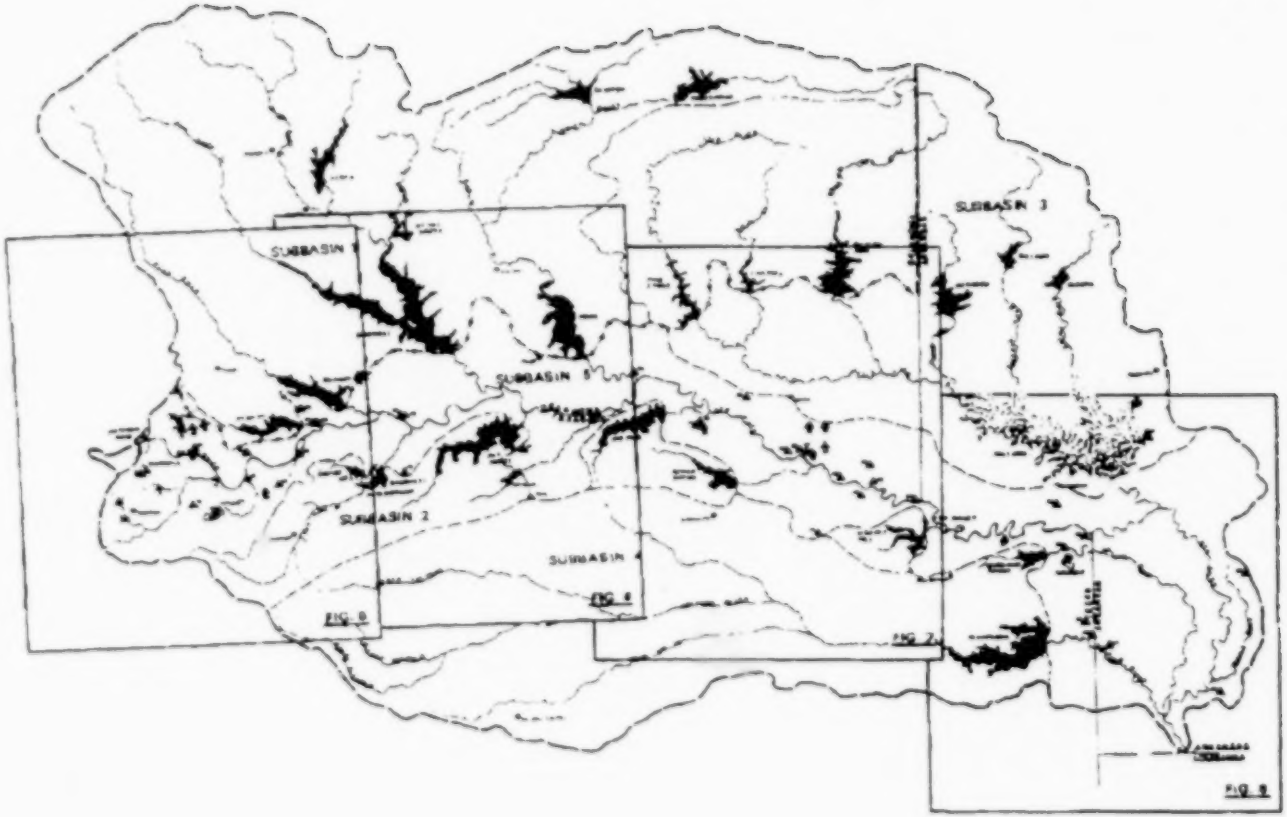
STREAM	SITE	AC-FT (1)	LATITUDE	LONGITUDE
Little River	Millwood	150,000	33°41.5'N	93°57.9'W

Subbasin 4 - Interstate Streams - Texas and Arkansas. This subbasin shall consist of those streams and their tributaries above existing, authorized or proposed last downstream major damsites, originating in Texas and crossing the Texas-Arkansas state boundary before flowing into the Red River in Arkansas. These streams and their tributaries with existing, authorized or proposed last downstream major damsites are as follows:

STREAM	SITE	AC-FT	LATITUDE	LONGITUDE
McKinney Bayou Trib.	Bringle Lake	3,052	33°30.6'N	94°06.2'W
Barkman Crk	Barkman Reservoir	15,900	33°29.7'N	94°10.3'W
Sulphur River	Texarkana	386,900	33°18.3'N	94°09.6'W

(1) Conservation Supply Capacity

REACH II
RED RIVER COMPACT COMMISSION
ENGINEERING ADVISORY COMMITTEE REPORT
ARKANSAS
OKLAHOMA
TEXAS
SUBAREA 1
SUBAREA 2
SUBAREA 3
SUBAREA 4



REACH II
RED RIVER COMPACT COMMISSION
ENGINEERING ADVISORY COMMITTEE REPORT

Subbasin 5 - Mainstem of the Red River and tributaries. This subbasin includes that portion of the Red River, together with its tributaries, from Denison Dam to the Arkansas-Louisiana state boundary, excluding all tributaries included in the other four subbasins of Reach II.

Figure 3 graphically illustrates the location of each of the five subbasins in Reach II.

Article V, Section 5.06 of the Red River Compact exempts from the allocation provisions of Article V, Section 5.05, those reservoirs within the limits of Reach II, Subbasin 5, with a conservation storage capacity of 1,000 acre-feet or less in existence or authorized on the date of the Compact pursuant to the rights and privileges granted by a Signatory State authorizing such reservoirs.

Figure 4 graphically illustrates Subbasin 5 and the way Subbasin 5 is divided for illustration of the location of the exempt reservoirs.

The exempt reservoirs as of May 12, 1978, are shown on Figures 5, 6, 7 and 8 and listed with pertinent data in Tables B, C, D and E.

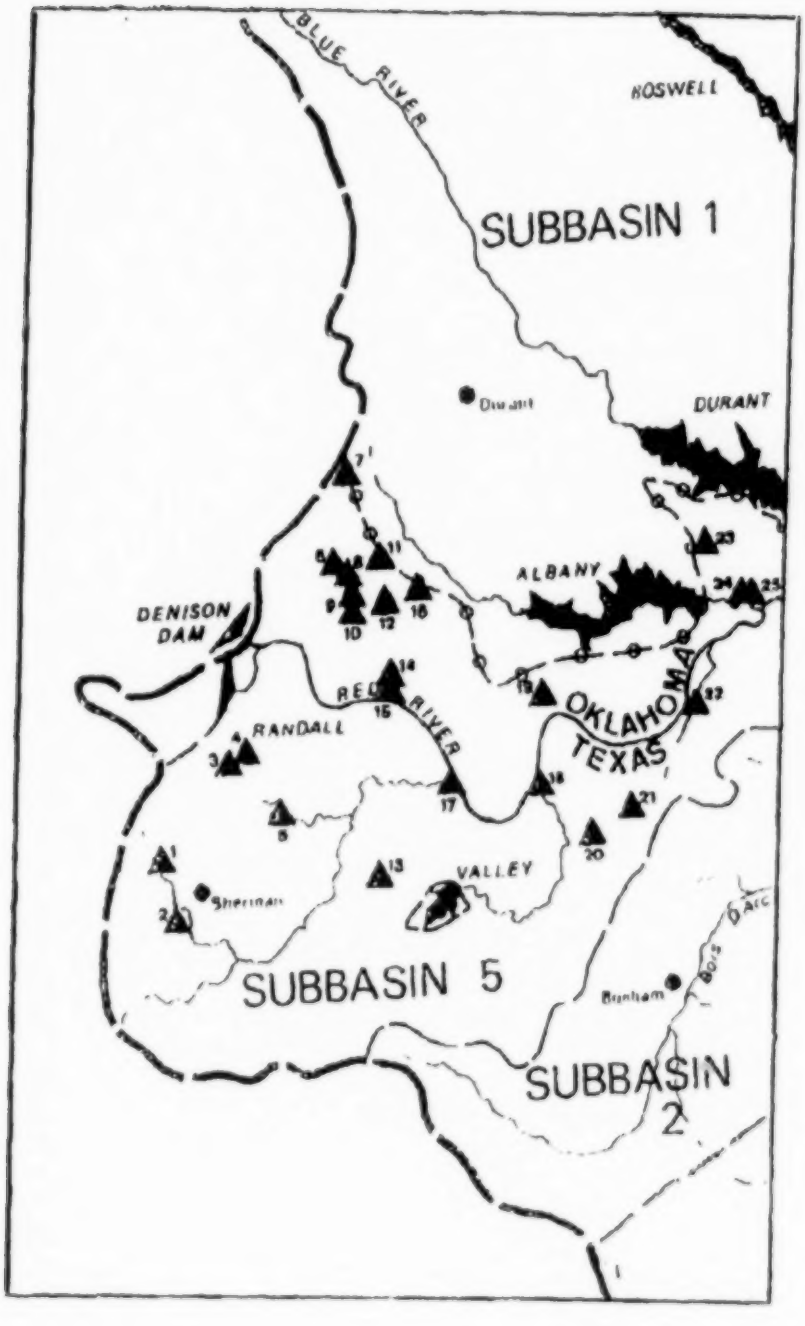


FIGURE 5

REACH II

RED RIVER COMPACT COMMISSION
ENGINEERING ADVISORY COMMITTEE REPORT

MAY 12, 1978

TABLE B
(Page 1)

RESERVOIRS IN REACH II, SUBBASIN 5, FIGURE 5

(Does not include reservoirs exempt by Compact section 2.08)

MAP KEY NUMBER	STATE (COUNTY)	RESERVOIR NAME (REFERENCE NUMBER)	CONSERVATION CAPACITY (ACRE-FEET)	ANNUAL DIVERSION AUTHORIZED (ACRE-FEET)	LOCATION LATITUDE LONGITUDE	LOCATION STREAM
1	Texas (Grayson)	SCS Site #11 (A-3126)	350	None	33°40.1'N 96°39.0'W	Post Oak Creek
2	Texas (Grayson)	Pickers Lake (A-2925)	351	None	33°37.2'N 96°38.1'W	Trib. of Choctaw Creek
3	Texas (Grayson)	Loy Lake (A-3537)	370	None	33°43.7'N 96°35.3'W	Loy Creek
4	Texas (Grayson)	SCS Site #38 (A-3100)	684	None	33°44.5'N 96°34.0'W	Trib. of Iron Ore Creek
5	Texas (Grayson)	Woodland Lakes (2) (A-3522)	30	30	33°41.9'N 96°31.9'W	Trib. of Iron Ore Creek
6	Oklahoma (Bryan)	Claunch (56-565)	20	40	33°52.5'N 96°29.4'W	Trib. of Sand Creek
7	Oklahoma (Bryan)	Savage (73-41)	125	150	33°56.0'N 96°29.1'W	Trib. of Little Sand Creek
8	Oklahoma (Bryan)	Weger Lakes (3) (71-442)	32	50	33°51.7'N 96°28.3'W	Sand Creek
9	Oklahoma (Bryan)	Horn (68-195)	68	68	33°50.7'N 96°28.3'W	Trib. of Sand Creek
10	Oklahoma (Bryan)	Inman (72-163)	20	40	33°49.8'N 96°28.3'W	Unnamed Trib. of Red River
11	Oklahoma (Bryan)	Ham Lakes (2) (74-385)	190	190	33°52.3'N 96°27.3'W	Sand Creek

(Continued)

TABLE B
(Page 2)

RESERVOIRS IN REACH II, SUBBASIN 5, FIGURE 5

(Does not include reservoirs exempt by Compact section 2.08)

MAP KEY NUMBER	STATE (COUNTY)	RESERVOIR NAME (REFERENCE NUMBER)	CONSERVATION CAPACITY (ACRE-FEET)	ANNUAL DIVERSION AUTHORIZED (ACRE-FEET)	LOCATION	
					LATITUDE LONGITUDE	STREAM
12	Oklahoma (Bryan)	McCarley (66-667)	350	700	33°50.4'N 96°27.3'W	Trib. of Eastmen Creek
13	Texas (Grayson)	Stern Lake (C-8825)	250	250	33°39.2'N 96°27.0'W	Mill Creek
14	Oklahoma (Bryan)	Kempe (71-104)	115	115	33°48.1'N 96°26.7'W	Trib. of Eastman Creek
15	Oklahoma (Bryan)	Potter (73-488)	88	400	33°47.3'N 96°26.7'W	Trib. of Red River
16	Oklahoma (Bryan)	Weger (66-212)	42	80	33°51.0'N 96°25.5'W	Eastman Creek
17	Texas (Fannin)	Lattimore Lake (2) (A-2786)	44	987	33°43.0'N 96°22.4'W	Old Channel of Choctaw Creek
18	Texas (Fannin)	Clark Lakes (3) (A-1989)	18	100	33°43.0'N 96°18.1'W	Off Channel near Caney Creek
19	Oklahoma (Bryan)	Williams (57-253)	170	240	33°57.7'N 96°17.9'W	Trib. of Red River
20	Texas (Fannin)	SCS Site #13 (C-4950)	320	320	33°40.0'N 96°15.8'W	Trib. of Caney Creek
21	Texas (Fannin)	Hanes Lake (C-5714)	21	50	33°41.7'N 96°12.3'W	Cottonwood Creek

(Continued)

TABLE B
(Page 3)

RESERVOIRS IN REACH II, SUBBASIN 5, FIGURE 5

(Does not include reservoirs exempt by Compact section 2.08)

MAP KEY NUMBER	STATE (COUNTY)	RESERVOIR NAME (REFERENCE NUMBER)	CONSERVATION CAPACITY (ACRE-FEET)	ANNUAL DIVERSION AUTHORIZED (ACRE-FEET)	LOCATION	
					LATITUDE LONGITUDE	STREAM
22	Texas (Fannin)	Lake Fannin (A-2305)	350	None	33°46.8'N 96°09.5'W	Trib. of Red River
23	Oklahoma (Bryan)	Musgrove (72-225)	85	85	33°53.3'N 96°09.8'W	Trib. of Tuklo Creek
24	Oklahoma (Bryan)	Carman #1 (67-737)	125	85	33°51.6'N 96°08.0'W	Trib. of Red Rivev
25	Oklahoma (Bryan)	Carman #2 (73-73)	230	240	33°51.8'N 96°07.7'W	Trib. of Red River

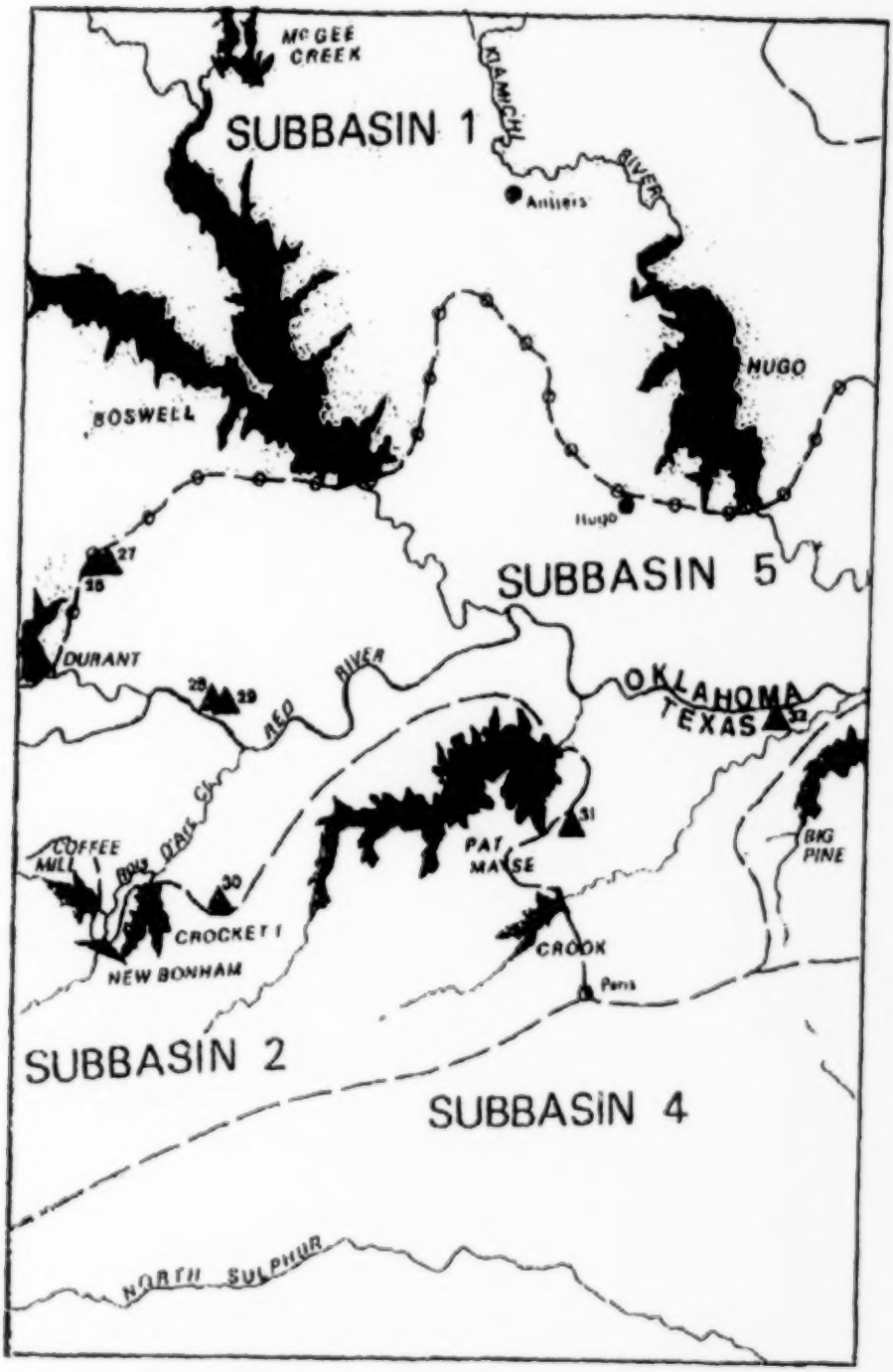


FIGURE 6

REACH II

RED RIVER COMPACT COMMISSION ENGINEERING ADVISORY COMMITTEE REPORT

MAY 12, 1978

TABLE C

RESERVOIRS IN REACH II, SUBBASIN 5, FIGURE 6

(Does not include reservoirs exempt by Compact section 2.08)

MAP KEY NUMBER	STATE (COUNTY)	RESERVOIR NAME (REFERENCE NUMBER)	CONSERVATION CAPACITY (ACRE-FEET)	ANNUAL DIVERSION AUTHORIZED (ACRE-FEET)	LOCATION LATITUDE LONGITUDE	LOCATION STREAM
26	Oklahoma (Bryan)	Corbett #1 (73-148)	40	585	33°58.7'N 95°59.5'W	Trib. to Whitegrass Creek
27	Oklahoma (Bryan)	Corbett #2 (73-148)	17	1,170	33°58.7'N 95°59.0'W	Trib. to Whitegrass Creek
28	Oklahoma (Bryan)	Van Sickle (59-29)	440	400	33°53.4'N 95°53.4'W	Trib. to Red River
29	Oklahoma (Bryan)	Lake West (54-673)	60	200	33°53.5'N 95°52.8'W	Trib. to Red River
30	Texas (Fannin)	Rannals Lake (A-2579)	18	10	33°44.0'N 95°52.5'W	Holder Creek
31	Texas (Lamar)	Lamar Lake (A-3613)	214	None	33°46.5'N 95°32.8'W	Trib. of Hicks Creek
32	Texas (Lamar)	Womack Lake (A-2867)	750	885	33°51.4'N 95°23.9'W	Oxbow Lake Near Red River

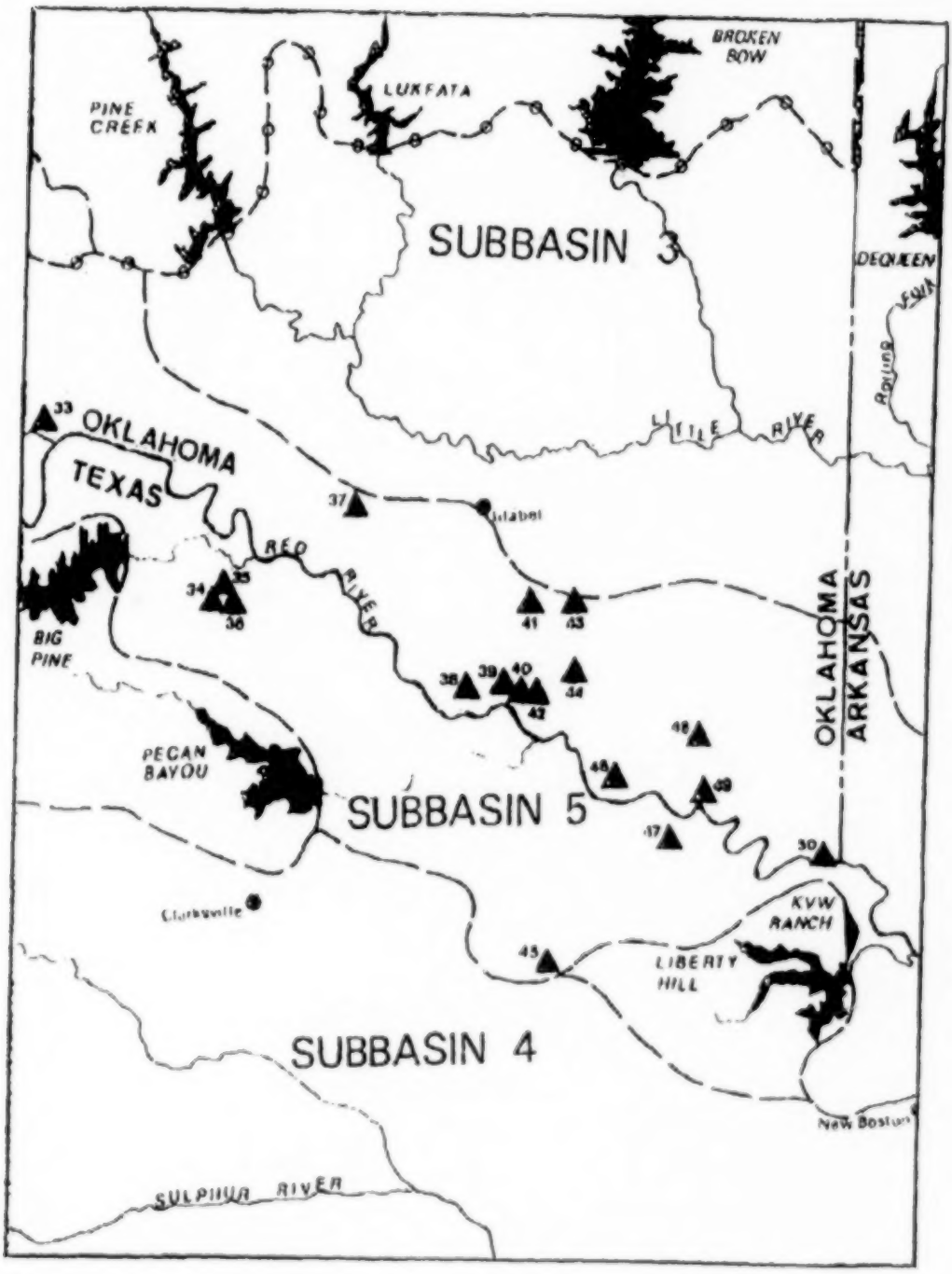


FIGURE 7

REACH II

RED RIVER COMPACT COMMISSION
ENGINEERING ADVISORY COMMITTEE REPORT

MAY 12, 1978

TABLE D
(Page 1)

RESERVOIRS IN REACH II, SUBBASIN 5, FIGURE 7

(Does not include reservoirs exempt by Compact section 2.08)

MAP KEY NUMBER	STATE (COUNTY)	RESERVOIR NAME (REFERENCE NUMBER)	CONSERVATION CAPACITY (ACRE-FEET)	ANNUAL DIVERSION AUTHORIZED (ACRE-FEET)	LOCATION: LATITUDE LONGITUDE	LOCATION: STREAM
33	Oklahoma (Choctaw)	Lake Raymond Gary	2,900	200	33°58.9'N 95°14.7'W	Gates Creek
34	Texas (Red River)	IGO Dam #1 A-3140	158	225	33°48.2'N 95°07.7'W	Trib. of Little Pine Creek
35	Texas (Red River)	IGO Dam #2 A-3141	102	150	33°49.1'N 95°06.7'W	Trib. of Little Pine Creek
36	Texas (Red River)	Somerville Lakes (2) (C-5241)	10	45	33°47.0'N 95°06.0'W	Trib. of Lick Creek
37	Oklahoma (McCurtain)	SCS Site #6 (72-256)	302	300	33°55.5'N 94°58.3'W	Waterhole Creek
38	Oklahoma (McCurtain)	Charles Lakes (74-509)	500	192	33°45.7'N	Oxbow Cutoff of Red River
39	Oklahoma (McCurtain)	Minitube Lake (55-1032)	36	255	33°46.3'N 94°48.2'W	Oxbow Cutoff of Red River
40	Oklahoma (McCurtain)	Victor Lake (55-1032)	25	200	33°45.8'N 94°47.5'W	Oxbow Cutoff of Red River

(Continued)

TABLE D
(Page 2)

RESERVOIRS IN REACH II, SUBBASIN 5, FIGURE 7

(Does not include reservoirs exempt by Compact section 2.08)

MAP KEY NUMBER	STATE (COUNTY)	RESERVOIR NAME (REFERENCE NUMBER)	CONSERVATION CAPACITY (ACRE-FEET)	ANNUAL DIVERSION AUTHORIZED (ACRE-FEET)	LOCATION LATITUDE LONGITUDE	LOCATION STREAM
41	Oklahoma (McCurtain)	Earl Young	360	None	33°49.7'N 94°47.0'W	Trib. to Waterfall Creek
42	Oklahoma (McCurtain)	1941 Cutoff Lake (55-1032) (72-421) (72-458) 64-730)	2,000	*8,878	33°45.7'N 94°46.5'W	Oxbow Cutoff of Red River
43	Oklahoma (McCurtain)	Kulli (59-83)	53	250	33°49.5'N 94°44.7'W	Trib. of Red River
44	Oklahoma (McCurtain)	Rimmer (67-739)	75	822	33°46.3'N 94°44.2'W	Trib. of Red River
45	Texas (Bowie)	Two Fox Lakes (C-5862)	40	35	33°34.9'N 94°44.6'W	Trib. of Mill Creek
46	Oklahoma (McCurtain)	Long-Bow (54-1398)	320	26	33°42.0'N 94°42.5'W	Oxbow Cutoff of Red River
47	Texas (Bowie)	Winston Lake (C-3297)	125	100	33°40.4'N 94°40.0'W	Mill Creek
48	Oklahoma (McCurtain)	Ward Lake (49-88)	1,050 *	300	33°44.5'N 94°37.5'W	Trib. to Norwood Creek

(Continued)

TABLE D
(Page 3)

RESERVOIRS IN REACH II, SUBBASIN 5, FIGURE 7

(Does not include reservoirs exempt by Compact section 2.08)

MAP KEY NUMBER	STATE (COUNTY)	RESERVOIR NAME (REFERENCE NUMBER)	CONSERVATION CAPACITY (ACRE-FEET)	ANNUAL DIVERSION AUTHORIZED (ACRE-FEET)	LOCATION	
					LATITUDE LONGITUDE	STREAM
49	Oklahoma (McCurtain)	Clear Lake (49-88)	2,100*	330	33°41.2'N 94°37.2'W	Oxbow Cutoff of Red River
50	Oklahoma (McCurtain)	New Lake (74-229)	500	2,036	33°37.5'N 94°30.0'W	Oxbow Cutoff of Red River

*It is acknowledged that these storages are in excess of 1,000 acre-feet, however these storages do not have any means of gravity releases and do have authorized diversions.

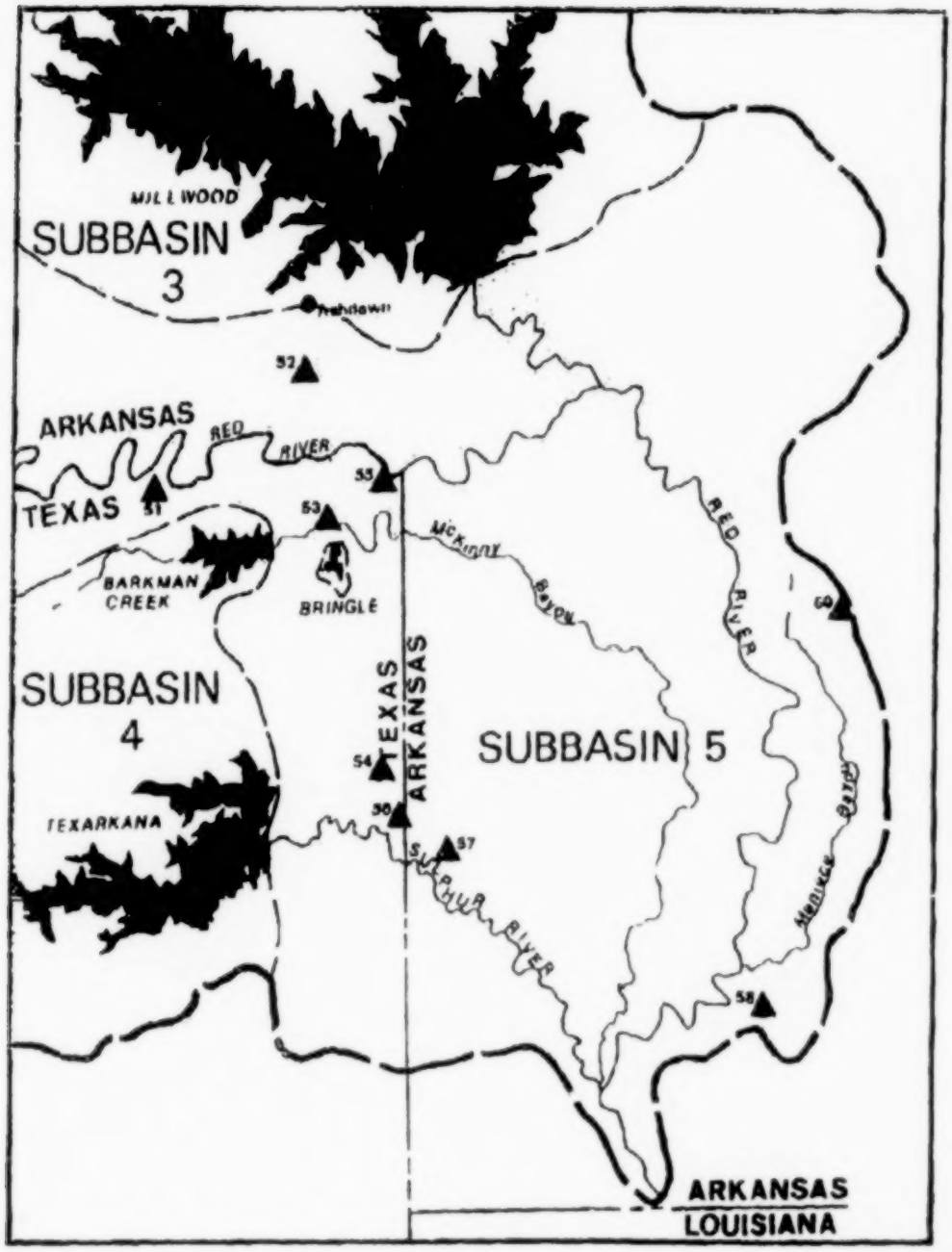


FIGURE 8

REACH II

RED RIVER COMPACT COMMISSION
ENGINEERING ADVISORY COMMITTEE REPORT

MAY 12, 1978

TABLE E

RESERVOIRS IN REACH II, SUBBASIN 5, FIGURE 8

(Does not include reservoirs exempt by Compact section 2.08)

MAP KEY NUMBER	STATE (COUNTY)	RESERVOIR NAME (REFERENCE NUMBER)	CONSERVATION CAPACITY (ACRE-FEET)	ANNUAL DIVERSION AUTHORIZED (ACRE-FEET)	LOCATION LATITUDE LONGITUDE	LOCATION STREAM
51	Texas (Bowie)	Cranfill Lake (C-6130)	35	137	33°32.1'N 94°17.3'W	Trib. to McKinney Bayou
52	Arkansas (Little River)	Worthman Ranch	900	----	33°38.1'N 94°08.2'W	Haney Creek
53	Texas (Bowie)	Rogers Lake (C-2833)	1	16	33°30.1'N 94°08.3'W	Trib. to Barkman Creek
54	Texas (Bowie)	Dept. of Justice 2 Ponds	84	84	33°23.1'N 94°04.4'W	Wagoner Creek Watershed
55	Texas (Bowie)	Brushy Lake (C-9275)	180	1,600	33°33.0'N 94°03.8'W	Oxbow Cutoff of Red River
56	Texas (Bowie)	Kennedy Lake (C-5625)	250	250	33°19.3'N 94°03.0'W	Trib. to Crutchers Creek
57	Arkansas (Miller)	Arknoname #146	728	---	33°15.0'N 93°57.4'W	Days Creek
58	Arkansas (Lafayette) Dam #1	Stewart Dam #1	976	---	33°09.4'N 93°42.2'W	Trib. to Red River
59	Arkansas (Lafayette)	Meriwether Pond Dam	360	---	33°23.8'N 93°35.5'W	Big Branch

REACH III

Article II, Section 2.12(c) of the Red River Compact defines Reach III as:

> "the tributaries west of the Red River which cross the Texas-Louisiana state boundary, the Arkansas-Louisiana state boundary, and those which cross both the Texas-Arkansas state boundary and the Arkansas-Louisiana state boundary."

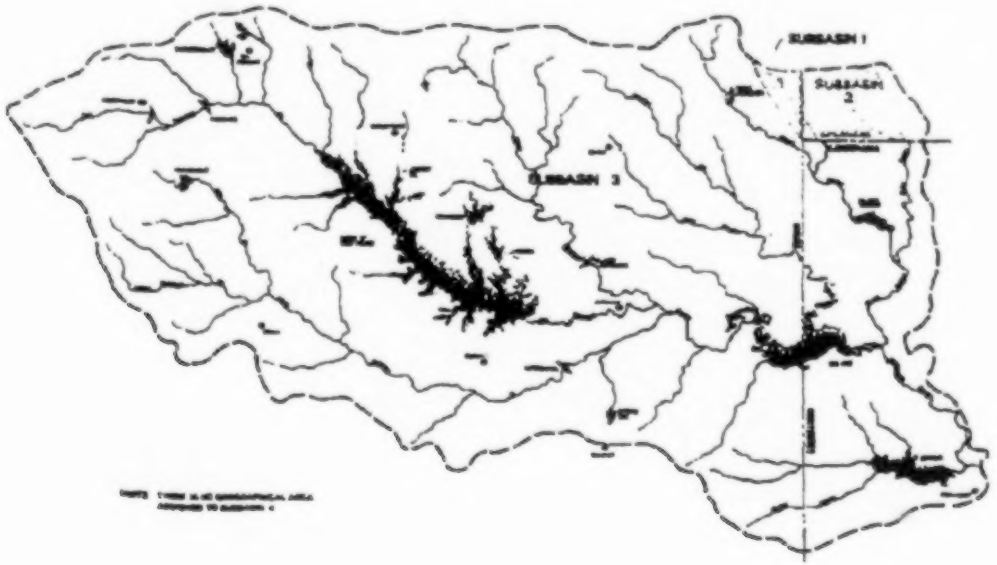
Article VI of the Red River Compact, Apportionment of Water-Reach III, divides Reach III into three topographic subbasins for the purpose of allocating the water therein. These three subbasins are:

> Subbasin 1 - Interstate streams - Arkansas and Texas. This subbasin includes the Texas portion of those streams crossing the Arkansas-Texas state boundary one or more times and flowing through Arkansas into Cypress Creek-Twelve Mile Bayou watershed in Louisiana.
>
> Subbasin 2 - Interstate streams - Arkansas and Louisiana. This subbasin includes the Arkansas portion of those streams flowing from subbasin 1 into Arkansas, as well as other streams in Arkansas which cross the Arkansas-Louisiana state boundary one or more times and flows into Cypress Creek-Twelve Mile Bayou watershed in Louisiana.
>
> Subbasin 3 - Interstate streams - Texas and Louisiana. This subbasin includes the Texas portion of all tributaries crossing the Texas-Louisiana state boundary one or more times and flowing into Caddo Lake, Cypress Creek-Twelve Mile Bayou or Cross Lake, as well as the Louisiana portion of such tributaries.

Figure 9 graphically illustrates the location of each of the three subbasins in Reach III.

> NOTE: There is no geographical area assigned to Subbasin 4.

Figure 9 graphically illustrates the location of each of the four subbasins in Reach III and indicates the location of reservoirs and proposed reservoir damsites mentioned in the Compact. They are



REACH III
RED RIVER COMPACT COMMISSION
ENGINEERING ADVISORY COMMITTEE REPORT

Franklin County, Titus County, Ellison Creek, Johnson Creek, Marshall, Lake O' the Pines, and Black Cypress. These existing and planned reservoirs in Texas, shown on pages III-13 and III-14 of the June 1970 Report of the Engineering Advisory Committee, were used during Compact negotiations in calculations to determine the yields from Caddo Lake and from an enlarged Caddo Lake shown on page III-14 of the June 1970 Report of the EAC.

The compact provides that Texas has the unrestricted right to all water above Marshall, Lake O' the Pines and Black Cypress damsites, provided that Texas shall not cause runoff to be depleted to a quantity less than that which would have occurred with the full operation of the above listed reservoirs, plus other impoundments and diversions existing on the effective date of the compact. It further provides that inflow to Caddo Lake from its drainage area downstream from Marshall, Lake O' the Pines, Black Cypress and other last downstreams dams existing on the date of signing of the compact document by the Compact Commissioners, (see Section 6.03.(b).(4). of the Red River Compact), will be allowed to continue flowing into Caddo Lake.

During Compact negotiations, reservoirs were being constructed in Texas at or near the proposed Titus County and Franklin County Reservoir sites, and other changes were being made or contemplated in the system of planned reservoirs upon which the above mentioned calculations were based.

The Engineer Advisors recognize that a complete tabulation of existing Texas impoundments and diversions is needed for future Compact Administration; however, such a tabulation is not feasible until the Compact becomes effective. The State of Texas has agreed that, as soon as the Compact has been consented to by the U.S. Congress, it would expeditiously prepare and provide to the State of Louisiana information concerning all Texas water uses as required to evaluate future Texas compliance with Section 6.03. (b),(1), and (4). of the Red River Compact.

REACH IV

Article II, Section 2.12 (d) of the Red River Compact defines Reach IV as:

> "the tributaries east of the Red River in Arkansas which cross the Arkansas-Louisiana state Boundary;"

Article VII of the Red River Compact, Apportionment of Water-Reach IV, divides Reach IV into two topographic subbasins for the purpose of allocating the water therein. These two subbasins are:

> Subbasin 1 - Intrastate streams - Arkansas. This subbasin includes those streams and their tributaries above last downstream major damsites originating in Arkansas and crossing the Arkansas-Louisiana state boundary before flowing into the Red River in Louisiana. Those major last downstream damsites are as follows:

STREAM	SITE	AC-FT	LATITUDE	LONGITUDE
Ouachita River	Lake Catherine	19,000	34°26.6'N	93°01.6'W
Caddo River	DeGray Lake	1,377,000	34°13.2'N	93°06.6'W
Little Missouri River	Lake Greeson	600,000	34°08.9'N	43°42.9'W
Alum Fork Saline River	Lake Winona	63,264	32°47.8'N	92°51.0'W

> Subbasin 2 - Interstate Streams - Arkansas and Louisiana. This subbasin consists of Reach IV less subbasin 1.

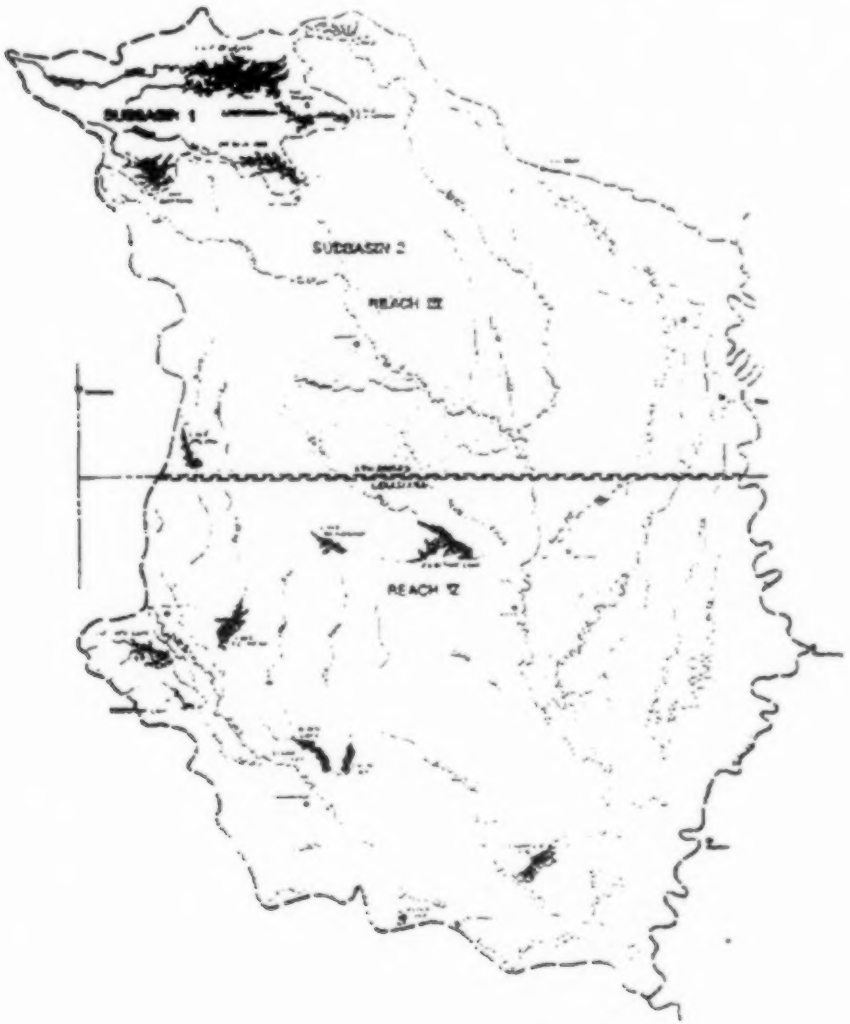
Figure 10 graphically illustrates the location of the two subbasins in Reach IV.

REACH V

Article II, Section 2.12(e) of the Red River Compact defines Reach V as:

> "that portion of the Red River and tributaries in Louisiana not included in Reach III or in Reach IV."

Figure 10 graphically illustrates the boundaries of Reach V.



REACH IV
APPROXIMATE DRAINAGE AREAS
(In square miles)

SUBBASIN	ARKANSAS
1	[illegible]
2	[illegible]
State Total	[illegible]
Reach IV Total	[illegible]

REACH V
APPROXIMATE DRAINAGE AREA
(In square miles)

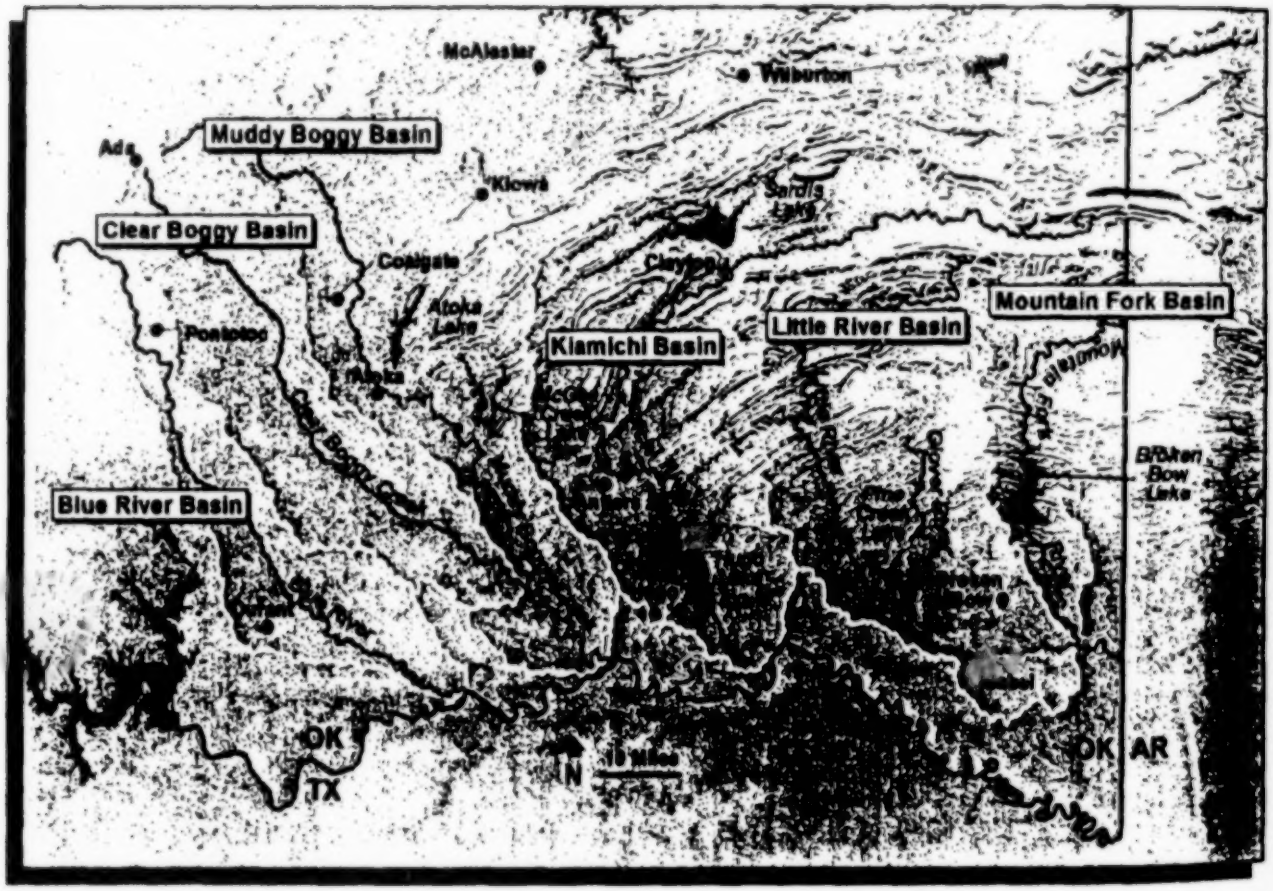
SUBBASIN	LOUISIANA
N/A	
State Total	17267
Reach V Total	17267

REACH IV & V
RED RIVER COMPACT COMMISSION
ENGINEERING ADVISORY COMMITTEE REPORT

Status Report
to the
Office of the Governor

Joint State/Tribal Water Compact & Water Marketing Proposals

Southeast Oklahoma Water Resources Development Plan



Oklahoma Water Resources Board
March 2002

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This report was authorized and published by the Oklahoma Water Resources Board. Sixty copies have been printed and distributed at an approximate cost of $14.50 each. Copies have been deposited at the Publications Clearinghouse of the Oklahoma Department of Libraries.

Status Report to the Office of the Governor
Joint State/Tribal Water Compact
& Water Marketing Proposals

Southeast Oklahoma
Water Resources Development Plan

INTRODUCTION

Intermittent exploration of utilizing southeast Oklahoma's abundant surface water resources to resolve the outstanding debt owed by the state to the federal government for Sardis Lake construction has been ongoing for more than 10 years. However, House Concurrent Resolution 1109, passed in May 2000 by the Second Session of the 47th Legislature, was perhaps the state's first comprehensive vehicle to accomplish that goal. Specific provisions of HCR 1109 directed the Oklahoma Water Resources Board (OWRB) to develop a water resources management plan for southeast Oklahoma, including identification of the following:

- sustainable long-term water supplies within the basin for flood control, environmental, and water supply purposes,
- excess water available for export and sale, and
- potential uses of revenue from such excess water sales for the purposes of improving water quality and environmental conditions within the Kiamichi River Basin.

As part of this effort, the Legislature also directed the OWRB, in conjunction with the United States Army Corps of Engineers, Tulsa District, to study the specified issues and further develop the plan to efficiently utilize the water supplies of the Kiamichi River for the benefit of the Basin region and adjacent areas. The OWRB and Corps were instructed to conduct the study in compliance with provisions of Enrolled House Concurrent Resolution 1066, passed in 1999, and recommendations from the Kiamichi River Basin Water Resources Development Plan. HCR 1066 and the resulting report were the vehicles that enabled the State of Oklahoma, through the Office of the Governor and OWRB, to initiate discussions with the Choctaw and Chickasaw Tribal Nations about development of a State/Tribal Water Compact and eventual resolution of conflicting water rights claims in southeast Oklahoma.

In addition, HCR 1109 provided authority for the OWRB, in conjunction with the Choctaw/Chickasaw Tribal Nations, to solicit nonbinding proposals for potential development of Kiamichi Basin area water resources, including the use of available waters within five additional watersheds in the region, which collectively produce in excess of 6.3 million acre-feet/year. Summaries of viable water development proposals submitted to the State and Tribes, which were mandated to be consistent with cornerstone principles established in the Kiamichi Plan to protect the region's water resources and the many benefits they provide, are presented in this status report to the Governor.

BACKGROUND

Southeast Oklahoma is home to abundant, renewable surface water resources. Six major river basins dominate the region: from west to east, the Blue, Clear Boggy, Muddy Boggy, Kiamichi, Little, and Mountain Fork. Collectively, based on conservative estimates of lowest downstream gages operated by the U.S. Geological Survey and Army Corps of Engineers, these watersheds produce 6,363,628 acre-feet/year (Figure 1).

The basins support six major reservoirs: Atoka Lake and McGee Creek Lake in the Muddy Boggy Creek Basin, Sardis Lake and Hugo Lake in the Kiamichi River Basin, Pine Creek Lake in the Little River Basin, and Broken Bow Lake in the Mountain Fork River Basin (Figure 2). Providing extensive benefits to Oklahomans, these lakes collectively store 751,250 acre-feet of water supply (yielding 648,660 acre-feet/year) and an additional 95,060 acre-feet (yielding 163,500 acre-feet) for water quality purposes. They also provide valuable flood control storage, collectively preventing approximately $200 million in potential flood-related damages, to date.

Consumptive water use in southeast Oklahoma is relatively minimal. A total of 354,345 acre-feet of both stream and groundwater is authorized for use within the six-basin area, but only about one-third of that amount (117,750 acre-feet) is reported as actually used each year, including slightly more than 11,000 acre-feet in the Kiamichi Basin. In comparison, the cities of Oklahoma City and Tulsa use a combined total of approximately 275,000 acre-feet of water in an average year.

At the center of recent investigations to generate revenue through water development opportunities in southeast Oklahoma is the State's outstanding construction obligation for Sardis Lake. Located on Jackfork Creek in Pushmataha and Latimer Counties, Sardis was constructed by the U.S. Army Corps of Engineers between 1975 and 1982 primarily for water supply, flood control, recreation, and fish and wildlife purposes. Because the State had confidence that the

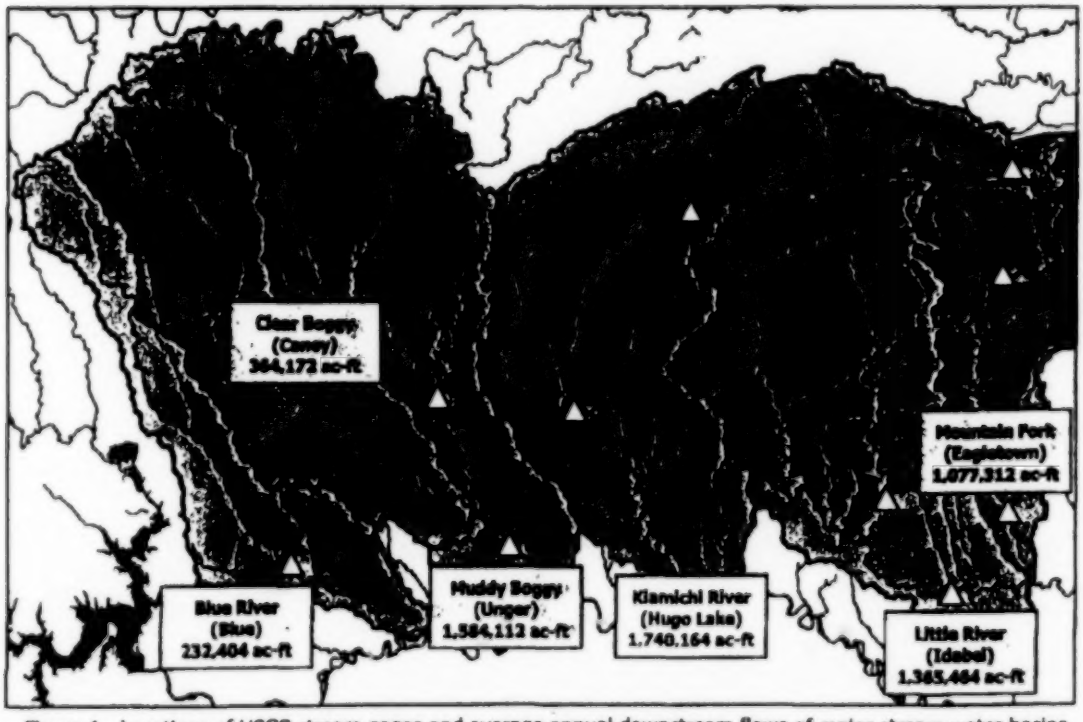

Figure 1. Locations of USGS stream gages and average annual downstream flows of major stream water basins, southeast Oklahoma (Clear Boggy gage is discontinued; all others active)

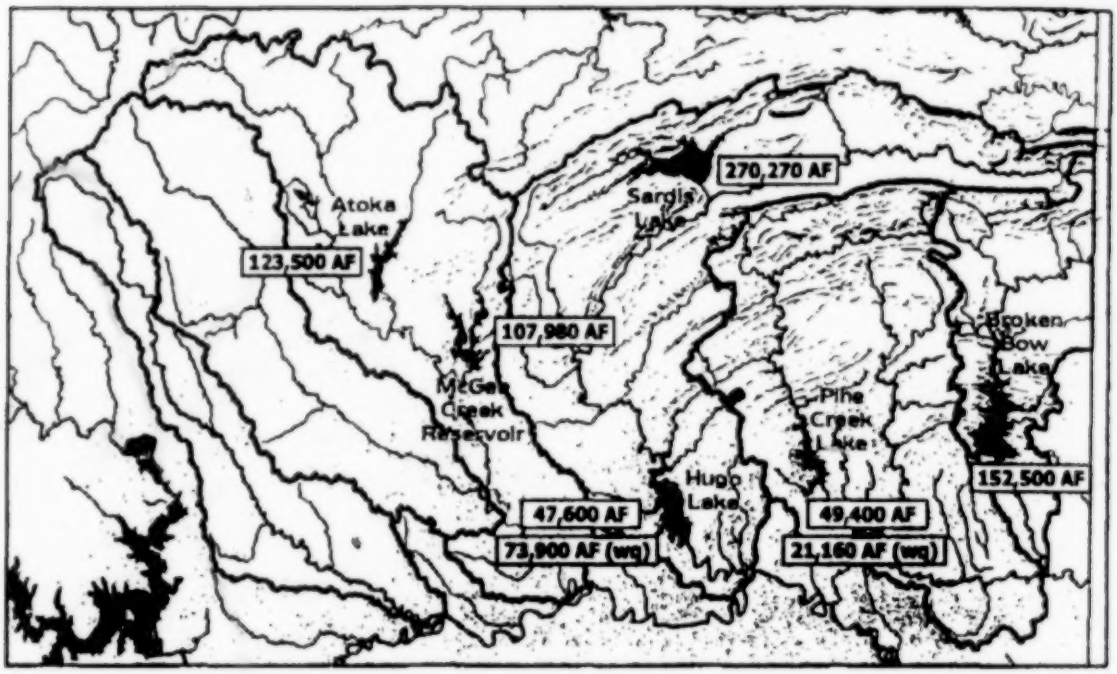

Figure 2. Major lakes and water supply (ws) and water quality (wq) storage in acre-feet (AF), southeast Oklahoma

lake's water supply would be utilized by local users and/or as a supplemental regional source for central Oklahoma and because the federal government would not start construction until a repayment contract was signed, the Oklahoma Water Conservation Storage Commission entered into the Sardis Lake Water Storage Contract with the Corps in 1974. The Oklahoma Attorney General specifically approved the agreement.

The Water Storage Commission, comprised of members of the Oklahoma Water Resources Board, was created by the State Legislature in 1963. The Commission was charged with reviewing and determining the feasibility of proposed federal projects as well as the present and anticipated needs of users in the projects' watersheds. If the Commission deemed a proposed project feasible, they were directed to negotiate with the federal government, municipalities and other interests to repay the costs of conservation storage in the project. However, as a necessary component of project construction, only storage not needed for present or future water use could be eligible for contract between the Commission and federal agency. The Commission would then hold this surplus water in trust and recover costs through usage by future customers. Senate Bill 138 (the "Oklahoma Sunset Law") terminated the Water Conservation Storage Commission and transferred all existing obligations to the OWRB. The Commission's last meeting was held in June 1979.

The Sardis Lake Water Storage Contract enables the State to use storage in the lake for municipal and industrial water supply in return for repayment of the project's construction costs attributed to water supply use. Forty-seven percent of the project's water supply storage is reserved for "present use" while 53 percent is reserved for "future use" where the contract's interest (4.012 percent) accumulates until that storage is used. The 1974 contract originally estimated water supply construction costs to total $16.4 million; the final actual cost of the water supply portion of the project totaled approximately $40 million. Through the Statewide Water Development Revolving Fund, which also serves as the funding source for Oklahoma communities in need of water and sewer project improvements, the State initially made six

annual payments to the Corps for approximately $2.7 million. Sardis is the only water supply lake in Oklahoma for which the State holds a contract to repay storage costs.

Anticipated development and subsequent use of Sardis Lake's water supply has not been realized and because the contract states that the Oklahoma Legislature is not legally obligated to appropriate funds for the payments, the State Legislature elected in 1989 not to authorize additional payments to the Corps. While payments were made in 1996 and 1997, bringing the paid amount to approximately $4.4 million, the State has deferred payments ever since. Oklahoma is currently more than $8.8 million in arrears, with the Corps claiming late payment interest of more than $2 million; outstanding storage costs now amount to approximately $38 million. Annual payments for use of Sardis water storage are presently more than $1 million, but could reach as much as $2 million if and when both present and future water supply storage are fully utilized.

Sardis Water Storage Contract Payments
State Of Oklahoma

Invoice	End Period	Invoiced	Principal Invoiced	Interest Invoiced	O&M Invoiced	Amount Paid	Principal Paid
1	01/06/1984	$415,107	$353,257	$0	$61,850	$415,107	$353,257
2	01/06/1985	$439,288	$51,404	$301,853	$86,031		$51,404
3	01/06/1986	$442,876	$53,467	$299,790	$89,619	$882,165	$53,467
4	01/06/1987	$449,959	$55,612	$297,645	$96,702	$449,959	$55,612
5	01/06/1988	$502,840	$57,843	$295,414	$149,583	$502,840	$57,843
6	01/06/1989	$481,690	$60,164	$293,093	$128,433	$481,690	$60,164
7	01/06/1990	$458,633	$62,577	$290,680	$105,376		
8	01/06/1991	$464,569	$65,088	$288,169	$111,312		
9	01/06/1992	$479,966	$67,699	$285,558	$126,709		
10	01/06/1993	$480,731	$70,415	$282,842	$127,474		
11	01/06/1994	$472,842	$73,241	$280,016	$119,585		
12	01/06/1995	$540,891	$76,179	$277,078	$187,634		
13	01/06/1996	$512,847	$79,235	$274,022	$159,590		
14	01/06/1997	$508,031	$82,414	$270,843	$154,774	$508,030	$82,414
15	01/06/1998	$1,160,322	$224,100	$699,416	$236,806	$1,175,850	$224,100
16	01/06/1999	$1,130,016	$233,091	$690,426	$206,500		
17	01/06/2000	$1,058,041	$242,442	$681,074	$134,525		
18	01/06/2001	$1,056,132	$252,169	$671,347	$132,616		
19	01/06/2002	$1,079,120	$262.286	$661,230	$155,604		
20	01/06/2003	$1,100,009	$272,809	$650,707	$176,493		
		$13,233,911			$2,747,217	**$4,415,640**	**$938,261**

Since 1990, several studies have been conducted and numerous efforts made to address the Sardis Lake contract and state/federal contentions surrounding the outstanding debt. Although each attempt has been meaningful and rewarding to some degree, all have failed to identify a popular, citizen-supported plan to resolve the controversy, and two pending lawsuits filed in 1998—a federal suit by the Department of Justice and a State taxpayers' demand suit—further complicate the matter and urge its resolution. Assisted through an amendment to the Water Resources Development Act of 1999 that authorized the Corps to accept a discounted

prepayment from the State of Oklahoma for Sardis water supply storage, the OWRB also continues to negotiate details of a potential agreement through the federal Office of Management and Budget. However, recent interest rate cuts have made this option less attractive for the time being.

Responding to local water supply concerns, the Water Board adopted a permanent rule in July 1999 that set aside 20,000 acre-feet/year for future water use in the 10-county area incorporating the Kiamichi River Basin, including the area surrounding Sardis Lake, which currently lacks a drinking water treatment and distribution system. An application for a U.S. Department of Agriculture (USDA) Rural Development loan, which will provide funding for construction of the Sardis Lake Water Authority and enable use of 500 acre-feet of water for its customers, is being processed while initial engineering designs are finalized. (A $122,397 OWRB REAP grant will provide the funding necessary to purchase that storage.) Although the Corps has agreed to allowances for that particular use, the federal agency is precluding use of additional water from the lake until resolution of the claimed breach of contract and restitution of late storage payments/interest.

Prompted by the ongoing legal dispute(s) and related issues concerning the outstanding Sardis Lake water storage obligation, the State Legislature passed House Concurrent Resolution 1066 on May 28, 1999. HCR 1066 directed the OWRB, designated Tribal representatives, and local citizens—together comprising the 17-member Kiamichi River Basin Working Group, co-chaired by Duane Smith, OWRB Executive Director and L.V. Watkins, advisor to the Choctaw and Chickasaw Tribes—to develop the Kiamichi River Basin Water Resources Development Plan for submittal to the State Legislature by February 1, 2000. The landmark legislation provided an opportunity for the State of Oklahoma to begin negotiations with the Tribes, whose lands encompass the Kiamichi River Basin, in an effort to facilitate development of the Basin's water supplies and identify potential benefits that those resources may provide to Oklahoma citizens.

Following six public meetings held from August 1999 through January 2000, the Kiamichi River Basin Water Resources Development Plan was submitted to the State Legislature in February 2000. In addition to offering a feasible, citizen-supported strategy to resolve the Sardis contractual obligation and develop Basin water resources, the plan refined the cornerstone principles established in HCR 1066 to guide potential water development opportunities. In summary, these explicit principles ensure the following:

- present and future water needs in the basin area are protected,
- various tourism/recreational benefits afforded by area lakes and water resources are protected,
- potential revenues for regional water/wastewater and related economic development needs are utilized,
- sufficient protection for the area's environment and endangered species is provided, and
- sufficient revenues to satisfy the State's Sardis Lake obligation as well as the Town of Hugo's water supply storage contract with the Corps of Engineers are generated.

The Kiamichi River Basin Working Group also offered seven "water development proposal evaluation criteria," consistent with the cornerstone principles, which they determined must be satisfied prior to approval of any proposed plan or project for the use, development, and/or transfer of Kiamichi River Basin water resources:

1. Is the proposal consistent with the cornerstone principle that grants Oklahomans the highest priority related to protection of present and future water needs?
2. Does the proposal protect future local uses of Sardis Lake water and does the proposal protect future water supply in the Hugo area and other areas in the Basin?

3. Does the proposal include implementation of a lake level management plan at Sardis Lake to protect fishery and recreational interests, and is the proposal compatible with existing and potential Hugo Lake management plans to protect Hugo's wildlife and waterfowl management areas?
4. Does the proposal optimize water/wastewater financing and related economic development opportunities in the Kiamichi River Basin?
5. Does the proposal address the State's obligation for construction costs at Sardis Lake?
6. Does the proposal include measures to satisfy the Hugo Municipal Authority's water storage contract with the Corps?
7. Does the proposal protect the integrity of the Kiamichi River, especially regarding endangered species and riparian landowners residing in the Basin?

Furthermore, in the selection of a proposal or plan, the Working Group emphasized that primary consideration should be afforded to the needs of citizens residing within the Basin followed by the various needs of State citizens in general. In addition, selection of a plan involving the transfer of water resources out of the Kiamichi Basin should be considered only after these needs are comprehensively addressed. Although the Kiamichi Plan identified several existing formal and informal proposals for the use, development and/or transfer of Kiamichi River Basin water supplies, the Working Group determined that none appeared to satisfy all water development criteria. As a result, they urged more detailed study of related issues prior to serious consideration of any plan's individual merits. The Working Group formally recommended that the State continue to pursue development of a water compact with the Choctaw and Chickasaw Tribal Nations. In addition, the Working Group encouraged broad public participation in potential water marketing/transfer plans involving Kiamichi Basin waters.

HCR 1109, passed in May 2000, directed the OWRB to coordinate with the Corps of Engineers on a study of southeast Oklahoma's water resources and to bring proposals for development of those waters to the State Legislature. The legislation required all valid proposals to be consistent with the cornerstone principles set forth in HCR 1066 and the February 2000 Kiamichi River Basin Water Resources Development Plan. In response to the legislation's mandate as well as recommendations offered in the Kiamichi Plan, the State (represented by officials from the Governor's Office and OWRB) and Tribal Nations 1) commenced formal water compact discussions through a memorandum of understanding in October 2000 and 2) initiated a cooperative request for qualifications process, also in October, to evaluate proposals for the development and/or marketing of available water in the southeast.

In July 2001, after the Corps received initial phase funding of $700,000 from Congress, the OWRB and Corps entered into a $7 million, 10-year cost-share study to examine opportunities for water resources development and protection in selected river basins in the southeast under various policy and planning scenarios. The first stage of the investigation, described in more detail later in this report, was completed in February 2002. Likewise, subsequent sections of this report present additional information concerning water compact negotiations, culminating in a draft State/Tribal Water Compact released in November 2001, and water marketing discussions with the North Texas Water Agency, a consortium of Texas water systems serving rapidly growing areas north of the Dallas/Fort Worth metroplex.

To guide all three interrelated tasks—the water compact negotiations, water marketing discussions, and southeast water resources study—cornerstone principles offered in HCR 1066 and the Kiamichi Plan were expanded to protect the many current and future benefits derived from waters in southeast Oklahoma and territories of the Choctaw and Chickasaw Tribal Nations.

SOLICITATION OF WATER DEVELOPMENT PROPOSALS

Joint State/Tribal Request for Proposals

In response to legislative directions provided through HCR 1109, on October 13, 2000, the OWRB and Choctaw/Chickasaw Tribal Nations released the Joint State/Tribal Request for Qualifications (RFQ), initiating a cooperative process to evaluate entities and organizations with a stated interest in submitting proposals for the use and development of surface waters in southeast Oklahoma. Specifically, the goal of the RFQ process was to establish the ability of potential applicants to finance and participate in a plan for the development of southeast Oklahoma waters. Preliminary views held that revenue (compensation) received by the State and/or Tribes for the use, development, and/or transfer of water would be reinvested to finance infrastructure and related economic development needed in the region. More specifically, the revenue would provide for repayment of construction costs for Sardis Lake to the Corps of Engineers, assist in establishment of a regional water supply system in the Sardis area, satisfy other water/wastewater infrastructure needs within the 22-county Choctaw and Chickasaw Nation area, and resolve outstanding Hugo Lake construction costs.

In the RFQ, the Water Board and Choctaw/Chickasaw Tribal Nations indicated that only those proposals consistent with the cornerstone principles and criteria contained in the Kiamichi River Basin Water Resources Development Plan would be considered, and any selected proposal would be of greatest value to the Kiamichi River Basin region, southeast Oklahoma, and the State of Oklahoma in general.

The 25-page RFQ document specified required guidelines, procedures, and resulting content of the Qualifications Proposals (QPs), which were to be submitted by December 29, 2000. In the RFQ, the OWRB and Tribal Nations stated that determination of potential environmental impacts resulting from the use or transfer of waters from southeast Oklahoma would be the responsibility of the chosen entity. Similarly, the RFQ clarified that the proposal must recognize all conditions and requirements of the National Environmental Policy Act and the actual project development would likely require determination of suitability by various state and federal agencies. The RFQ also made clear that qualified entities must be responsible for implementation of the project and bear all costs associated with necessary studies, permits, engineering designs, land and right-of-way acquisition, and construction.

Following final selection of the short-listed entity(s), the OWRB and Tribal Nations anticipated distribution of a Joint State/Tribal Request for Proposals, a cooperative evaluation process of the qualifying applicants' water/economic development proposals for selection and recommendation to the State and Tribal Legislatures. It was also anticipated that the OWRB and Tribal Nations would issue a RFP following concurrence of the Oklahoma State and Tribal Legislatures.

On November 14, 2000, the OWRB and Choctaw and Chickasaw Tribal Nations hosted the Joint State/Tribal Request for Qualifications (RFQ) Pre-Submittal Workshop. There were approximately 40 attendees representing the following: Texas interests (Texas Water Development Board, North Texas Water Alliance, Dallas Water Utilities, Tarrant County Regional Water District, Upper Trinity Regional Water District, City of Irving, and North Texas Municipal Water District), Oklahoma City and central Oklahoma (Oklahoma City Water Utilities Trust, Central Oklahoma Water Authority, and Central Oklahoma Water Resource Board), the Sardis and southeast Oklahoma area (Sardis Lake Water Authority, Sardis Water Resources Board, Clayton Chamber of Commerce, Idabel Chamber of Commerce, Idabel Industrial Authority, and McCurtain County Community Trust), various engineering firms, and private interests.

Qualifications Proposals were submitted by three entities: the North Texas Water Alliance (following incorporation, the North Texas Water Agency (NTWA), including the North Texas Municipal Water District, City of Irving, Dallas Water Utilities, Tarrant Regional Water District, and Upper Trinity Regional Water District), Oklahoma City Water Utilities Trust (OCWUT), and Central Oklahoma Water Authority. The QPs for NTWA and OCWUT contained detailed information about the applicants' interests, experience, financial viability, and technical capabilities in relation to potential participation in a water development plan or project. Guided by proposal evaluation criteria established in the Kiamichi Plan, the OWRB and Tribal Nations reviewed and appraised the QPs, then short-listed two applicants—the NTWA and OCWUT—to proceed in the actual *proposal evaluation* process, pending an informal discussion phase with the two entities.

Although focusing primarily on qualifications, the QPs contained substantial information on each entity's plan for development. Project sponsors have repeatedly indicated that ensuring future water supply for central Oklahoma is integral to, if not entirely dependent upon, future implementation of the Southeast Oklahoma Water Resources Development Plan. A more detailed summary of the NTWA and OCWUT proposals is presented later in this report (see "Summary of Proposals").

Oklahoma City Water Utilities Trust Proposal

The Oklahoma City QP included a May 1995 resolution passed by the OCWUT to purchase water supply storage at Sardis Lake, which would significantly improve long-term water availability and reliability throughout central Oklahoma. OCWUT would assume the State's arrearage on the Sardis repayment contract, current and future storage payments to the federal government, annual Sardis operation and maintenance costs, and work to establish a local organization to address local economic and water supply concerns (similar to the McGee Creek Authority or Canton Lake Advisory Committee). However, more recent informal discussions between the OWRB and Trust were tempered by the State's unwillingness to permanently assign Sardis storage rights to Oklahoma City and subsequently relinquish control of lake level protections. The Trust's QP stated serious concerns in proceeding forward in a plan for development without consideration of less restricted access to Sardis storage.

If Sardis storage concerns were resolved, the most likely transfer scenario would involve the withdrawal of a minimum of approximately 55,000 acre-feet/year from available streamflows (or downstream water released from the Sardis water supply pool) from the Kiamichi River at a point near Moyers (just north of Antlers), and then transfer of the water westward through a pipeline to McGee Creek Lake, the furthest reach of Oklahoma City's existing southeast supply system (via the Atoka Pipeline, Figure 3). No specific draw schedules were discussed with Oklahoma City officials. If the existence of endangered species—such as the Ouachita Rock-Pocketbook Mussel, which depends upon consistent flow in the Kiamichi River—preclude or complicate the taking of water at Moyers, it is possible that Oklahoma City would pursue withdrawal from either the upper or lower reaches of Hugo Lake, some 33 and 40 river miles downstream, respectively (Figure 4). However, the Hugo option would be considerably more expensive.

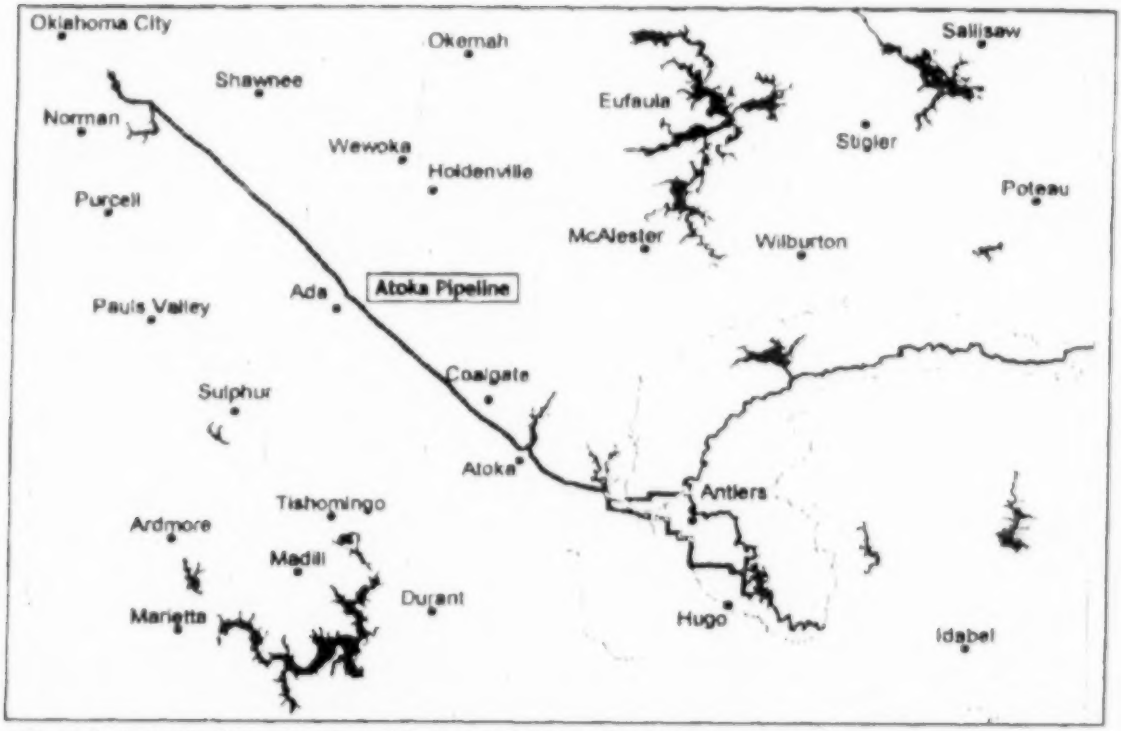

Figure 3. Atoka Pipeline and conceptual designs of Oklahoma City Water Utilities Trust proposal, Kiamichi River Basin

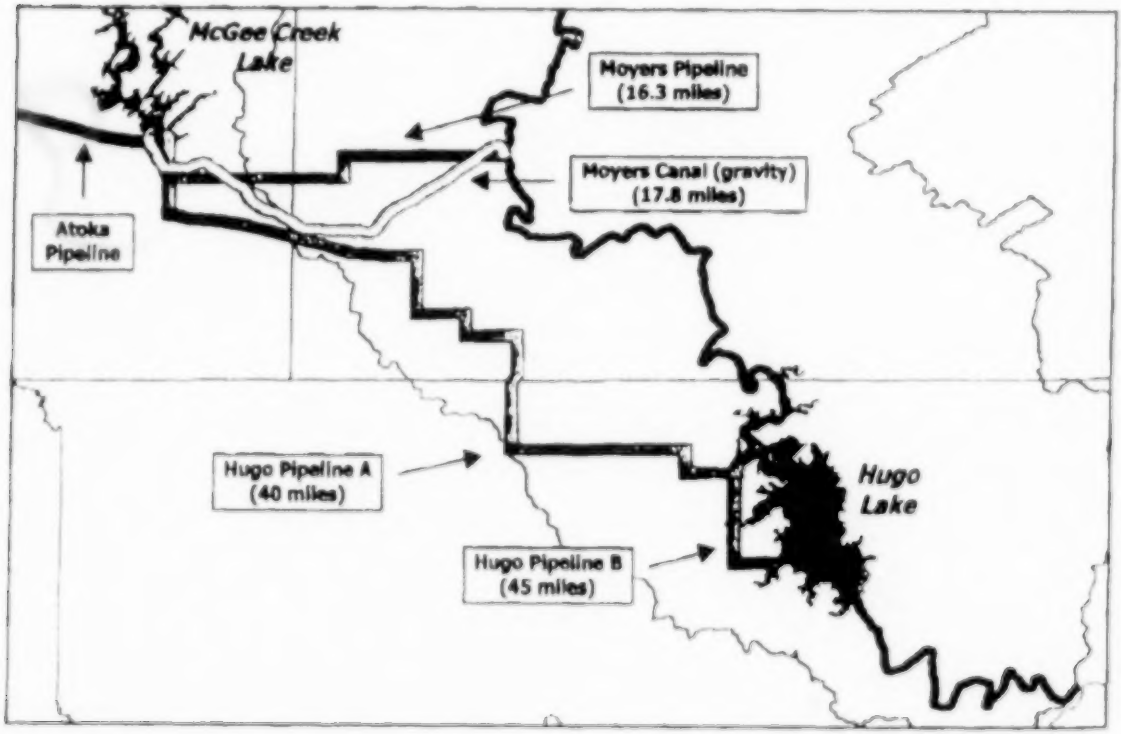

Figure 4. Conceptual design options and pipeline distances for transfer of Kiamichi River Basin water from Hugo Lake to Atoka Pipeline/McGee Creek

North Texas Water Alliance/Agency Proposal

Population projections estimate that the population of the State of Texas will double within the next 50 years; much of this growth, as well as associated water requirements, is expected to occur in the north Texas region. The NTWA water development proposal, as indicated in their QP and subsequent informal discussions, includes the taking of approximately 120,000 to 160,000 acre-feet/year of water from the Kiamichi River below Hugo dam to absolutely minimize potential environmental and related adverse impacts further upstream (Figure 5). In addition to its obvious close proximity to the north Texas region, this transfer point takes full advantage of accumulated streamflows and runoff from the substantial upstream watershed area. NTWA officials indicated that, should a water transfer agreement be executed, a pipeline would likely be constructed from the Kiamichi River, just north of its confluence with the Red River, to a tributary of Lake Lavon, the primary water supply reservoir of North Texas Municipal Water District.

NTWA also indicated their desire to purchase, if available, additional waters from sources in southeast Oklahoma in future phases of their development plan. A second, or expanded, NTWA proposal contemplates the use of up to an additional 200,000 acre-feet/year from the Little and Mountain Fork River Basins (Figure 6). This option is attractive due to the substantial flows available in the Little River, including water quality storage (21,160 acre-feet/year) from Pine Creek Reservoir, Broken Bow Lake hydropower releases, and additional releases from Broken Bow to support the downstream Mountain Fork River trout fishery. The most likely scenario would involve construction of a pipeline to transport water from the Little River along U.S. Highway 70, also facilitating creation of an economic development corridor in southern Oklahoma.

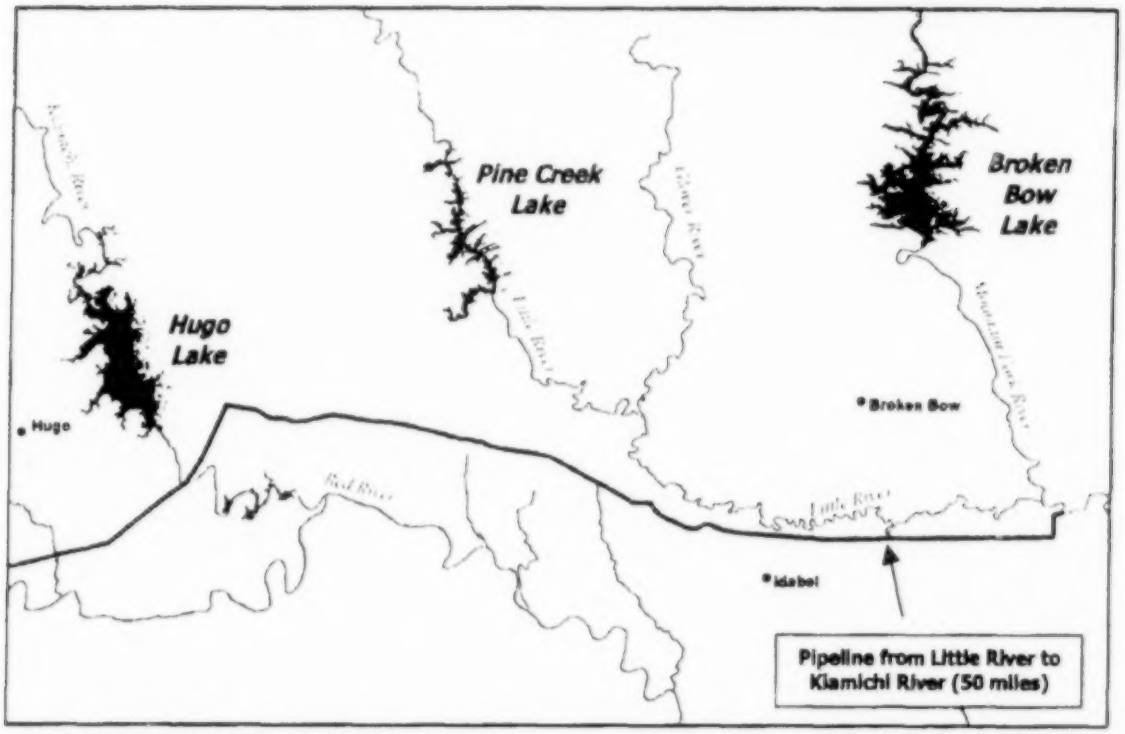

Figure 5. Conceptual design of North Texas Water Agency proposal for water transfer from Little River and Mountain Fork River Basins to Kiamichi River, downstream of Hugo Lake

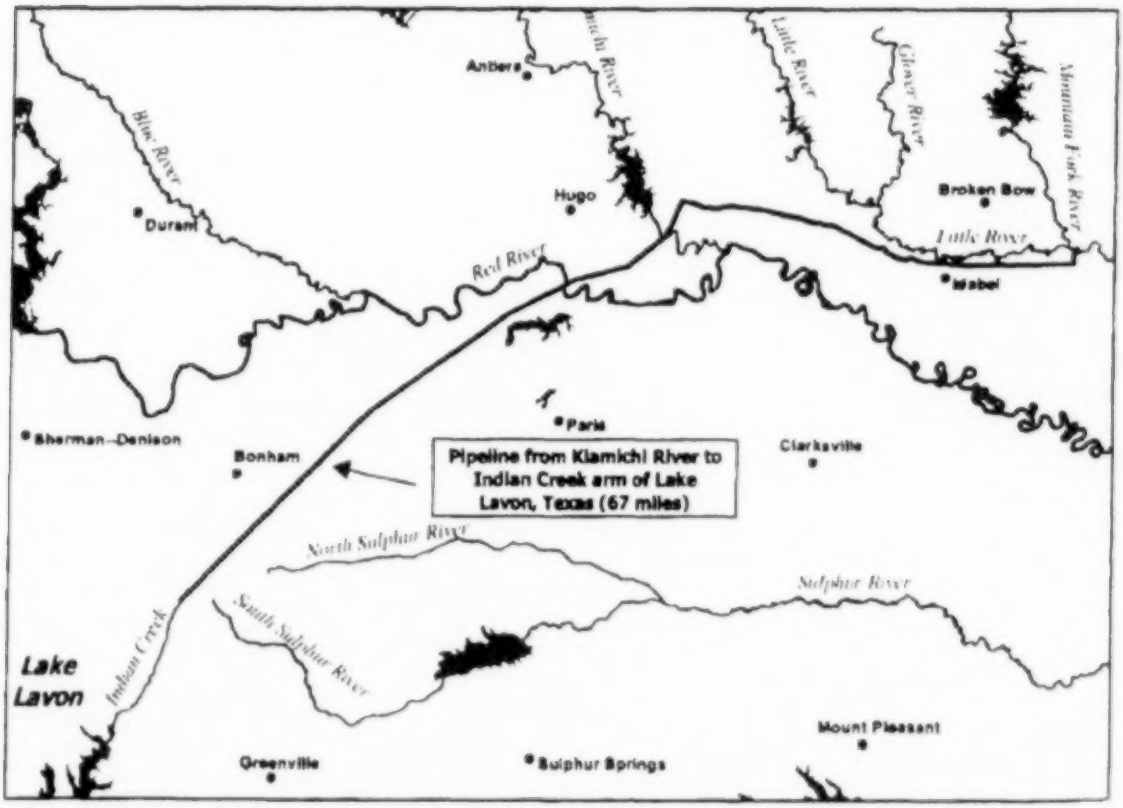

Figure 6. Conceptual design of North Texas Water Agency proposal for water transfer from Little, Mountain Fork, and Kiamichi River Basins to north Texas (via arm of Lake Lavon)

DEVELOPMENT OF THE DRAFT STATE/TRIBAL WATER COMPACT

Initial Claim to Water by the Choctaw/Chickasaw Nations

In August 1992, during the period when the OWRB was negotiating a draft water marketing agreement with North Texas Municipal Water District, as directed in Senate Joint Resolution 31, the Choctaw Nation and Chickasaw Nations submitted a written claim to ownership of and sovereign rights to regulate all water within the Tribal Nation's original land area in southeast Oklahoma. L.V. Watkins, then special counsel for the Choctaw and Chickasaw Tribal Nations, presented a summary of the Tribal Nation's legal position relating to water rights during a meeting with Water Board staff, U.S. Bureau of Indian Affairs representatives, and the U.S. Department of Interior Solicitor's office in Tulsa.

During the 1830s and 40s, the federal government entered into treaties and agreements to remove the Choctaw/Chickasaw Tribes from Mississippi and other areas in the southeastern U.S. The treaties and agreements, including the Treaty of Dancing Rabbit Creek, clearly indicated that the Choctaws and Chickasaws would be provided land in a territory west of Arkansas without further disturbance by the federal government or non-Indians. The Tribal Nations held that these various treaties and agreements were very broad with respect to the authority and ownership rights that they would have over these lands. The federal government followed up with the provisions in some of the treaties and provided federal patents to these lands. Government patents form the root of title to all property in the U.S. and are provided by the sovereign government (United States, state, or tribal government) claiming ownership of the land at the time the patent is granted.

The Choctaw and Chickasaw Tribal Nations claimed that the U.S. patent was all-inclusive, very broad, and contained no express reservations of interest. From the Tribes' point of view, the broad patent language meant that all water (surface water and groundwater) was transferred from the U.S. to the Tribal Nations during the 1830s and 40s. The Choctaw Nation patent describes a land area roughly west of Arkansas, between the Arkansas River and Red River, west to a line running north from Durant, Oklahoma, to the South Canadian River. The Chickasaw Nation area was located immediately west of the Choctaw area, between the South Canadian and Red Rivers west to the 98th meridian line running north from Waurika (Figure 7). Pursuant to another treaty between the United States and Choctaw/Chickasaw Nations, the Chickasaw Tribe was granted a 25 percent joint interest in the lands of the Choctaw Nation.

The Choctaws and Chickasaws also point to special federal legislation, adopted prior to Oklahoma statehood in 1907, that addressed the Five Civilized Tribes (Choctaws, Chickasaws, Cherokees, Creeks, and Seminoles) differently than other tribes relating to allotments and assimilation of Tribal members into traditional American society. They argued that the Five Civilized Tribes are the only tribes to obtain federal patents for their land, and that the tribal governments of the Five Civilized Tribes were given authority to provide tribal patents when transferring tribal lands to allottees. The Tribes contend that all water not transferred to the allottees remained with the tribal governments.

A key element to the Tribal claims is found in Oklahoma's own Enabling Act, representing permission from Congress for Oklahoma Territory and Indian Territory to form the State of Oklahoma and adopt a state constitution. Section 1 of the 1906 Enabling Act specified that nothing in the State Constitution shall be adopted to limit or impair the rights of persons or property pertaining to the Indians of Oklahoma Territory and Indian Territory, or limit federal authority in dealing with the Indians. Accordingly, Section 3 of the 1907 Oklahoma Constitution

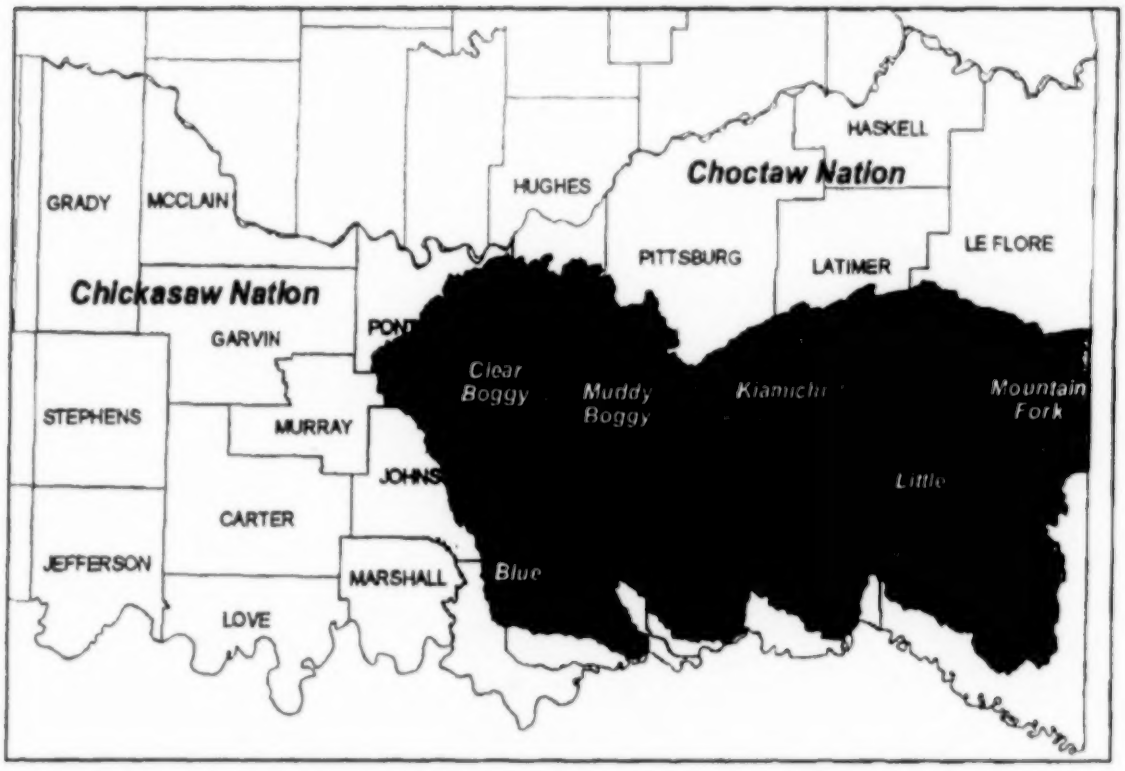

Figure 7. Choctaw and Chickasaw Nation boundaries and major watersheds, southeast Oklahoma

provides that the people inhabiting the State do agree and declare that they forever disclaim all right and title to lands lying owned or held by any American Indian, tribe, or nation.

Finally, to support their claims to ownership of and sovereign authority to control use of all waters within their original tribal boundaries (encompassing all or parts of 22 counties in southeast Oklahoma), tribal representatives pointed to several principles of law adopted by the U.S. Supreme Court, including two major cases interpreted in favor of Indian tribes.

In Cherokee Nation and Choctaw Nation v. State of Oklahoma (1970 Arkansas Riverbed case), the U.S. Supreme Court determined that based on treaties and agreements with the Tribes, the ownership of the riverbed of the Arkansas River (between what is now Lake Eufaula dam and the Arkansas state line) did not pass to the State of Oklahoma upon its admission as a state, but instead rested in the Tribes.

In the 1960 United States v. Grand River Dam Authority case, the U.S. Supreme Court denied GRDA's claim for just compensation by virtue of the U.S. Army Corps of Engineers' decision to install and operate a hydropower facility at Fort Gibson Reservoir on the Grand River. The Supreme Court, quoting a case dealing with the Osage Nation and mineral rights, reasoned that the title of the Indian tribes was established by federal grant when the U.S. government had complete sovereignty over the territory in question. The decision stated that the State of Oklahoma "when she came into the Union, took sovereignty over the public lands in the condition of ownership as they were then." GRDA had argued that it obtained title to water rights from the State when the Oklahoma Legislature created GRDA in 1935 and legislatively appropriated all waters of the Grand River to GRDA, and that the Corps' action was a "taking" of that water right transferred from the State to GRDA. The Supreme Court indicated that no water rights had passed from the federal government to Oklahoma and from Oklahoma

to the GRDA under a 1906 federal law allowing power and light companies to construct dams in Cherokee territory for power and other purposes. In other words, GRDA could not show a chain of title to the water rights it claimed was taken by the Corps of Engineers. With no water right, there could be no taking of that right, and therefore, the federal government owed nothing to GRDA.

Initial Discussions with the Choctaw and Chickasaw Tribal Nations

Following the August 1992 water rights claim, staff of the OWRB entered into preliminary discussions with representatives of the Choctaw and Chickasaw Nations. Relative to the then-ongoing contract negotiations with North Texas Municipal Water District, Tribal representatives initially indicated that they should control all sales of water from their territorial areas, in-state and out-of-state, and should retain all the subsequent revenues.

However, it was clear that proper administration of water rights was required to provide assurance of rights to use water for a water marketing agreement. Tribal representatives indicated that because the tribes were not necessarily interested in establishing a new and separate regulatory system to govern water use, they would agree to share revenues with the State if the State would continue its water rights administration program (i.e., appropriation permits issued by the OWRB). Discussions with Tribal representatives terminated soon after SJR 31 was declared void by an opinion of the Attorney General.

Recent State/Tribal Compact Negotiations—HCR 1066 and HCR 1109

During initial meetings of the Kiamichi Basin Working Group, it became clear to staff of the OWRB that an independent analysis was required of the Indian water rights claims made by the Choctaws and Chickasaws. During the late fall of 1999 and early 2000, the OWRB and City of Oklahoma City (concerned about the impact of the tribal claims on Oklahoma City's use of water from Atoka Lake and McGee Creek Lake, which lie within the original Tribal territories) entered into a joint professional services contract with the Arizona law firm of Ryley, Carlock, and Applewhite to provide a legal opinion of the claims. That opinion was provided in February 2000.

To maintain proper confidentiality and attorney-client privilege, the legal memorandum to support the opinion has not been disclosed. However, the summary opinion letter was disclosed by the City of Oklahoma City. Essentially, Mike Brophy, lead counsel for the Arizona law firm, indicated his view that the water rights claims are not supported to the degree claimed by the Tribes. However, Brophy also acknowledged that because some claims might be supported (possibly creating the potential for a problematic "checker-boarding" of water rights administration), the State should compact with the Tribes rather than litigate.

Experience in other states has shown that Indian water rights litigation is a time-consuming and expensive process that often results in a further clouding of the situation, threatening the potential economic development benefits of related water uses. Furthermore, after litigation, a court opinion probably would not resolve all the pertinent issues, requiring additional litigation and costing more money and time to all involved parties.

The final report resulting from the HCR 1066 effort was completed and presented to the Oklahoma State Legislature in February 2000. Recommendations of the HCR 1066 Kiamichi Working Group advised the State of Oklahoma to pursue formal development of a compact or other agreement with the Choctaw and Chickasaw Tribes that would facilitate the development

and best uses of water resources in the Kiamichi River basin, incorporating the cornerstone principles set forth in HCR 1066, which were identified and refined by the Working Group in the HCR 1066 report.

On May 26, 2000, the Oklahoma Legislature adopted HCR 1109. Among other provisions, HCR 1109 directed the OWRB, in conjunction with the U.S. Army Corps of Engineers, to develop a Southeast Oklahoma Water Resources Management Plan, including a study to be conducted in compliance with HCR 1066 and recommendations of the Kiamichi River Basin Water Resources Development Plan.

During the summer and early fall of 2000, staff of the OWRB and Choctaw and Chickasaw Nations began initial water rights compact discussions as recommended in the Kiamichi Plan. Pursuant to State law, it was understood that the Governor of Oklahoma possesses sole authority to "negotiate" with federally recognized tribes. Therefore, OWRB staff initiated dialogue with the Governor's Office concerning the need for a compact with the two Tribal Nations in order to pursue any plan for water development in southeast Oklahoma. These initial discussions between representatives of the Tribes and Governor's Office resulted in a written Memorandum of Understanding (MOU) executed on October 12, 2000. The MOU indicated that a negotiated water compact would address three primary issues: water rights administration, water quality standards administration, and development and use of water in the compact area. The MOU also offered a timeline within which a draft Compact and proposal(s) for development of water in the compact area would be presented to the Oklahoma Legislature. Howard Barnett, Chief of Staff for Governor Keating, was the lead negotiator for the State of Oklahoma in subsequent compact negotiations. Mr. Barnett sought technical assistance from staff of the OWRB and relied on staff to review discussion drafts of compact language so that existing State law and hydrological considerations were properly represented in negotiations. The Governor, in consultation with Mr. Barnett, had the ultimate say in approving draft compact language and provisions.

Provisions of the Draft State/Tribal Water Compact

Full Legislative Approval of Compact

An initial matter addressed by the Office of the Governor and Tribal representatives was the general process for compact approval. All parties acknowledged that existing State law (74 O.S. §1221) provides that the Governor may negotiate intergovernmental agreements with any of the 39 federally recognized tribes, and that the Legislature's Joint Committee on State-Tribal Relations has authority to approve such intergovernmental agreements. However, all parties also recommended that in view of the significance and importance of the issue, the full Oklahoma Legislature should review and approve the draft water compact rather than just the Joint Committee. Accordingly, the draft compact expressly requires full legislative approval for ratification.

Full Legislative Approval of Out-of-State Water Marketing Contracts

During early discussions between the State and Tribal Nations, it was agreed that the full Oklahoma Legislature must approve any out-of-state water marketing agreement. Therefore, provisions are included in the compact to make it clear that, in addition to full legislative approval of the water compact with the Tribes, any out-of-state water use agreement must be presented to and approved by the full Oklahoma State Legislature.

No Impact on Private Property Rights

The OWRB has received many questions and comments concerning the potential impact of the compact on private property rights. Comments range from concern about the taking of groundwater to satisfy a water sale, to taking water from farm ponds, to subjecting water rights to Tribal review and approval. Parties to the compact resolutely agree that the compact should impact no private property rights. Furthermore, the draft compact specifically declares in several provisions that groundwater will not be sold, and all existing appropriation rights to stream water, water in lakes, and water in farm ponds are protected as they are under State law. Finally, because the Tribal water rights claims were broad and included groundwater (recognized under state law as private property of the landowner), provisions of the compact address groundwater to remove the associated water rights cloud and provide assurance that existing state procedures would continue to be followed.

Major Subjects of the Compact

Major subjects addressed in the draft compact are as follows:

Parties

As drafted, the parties to the compact include the State of Oklahoma, Choctaw Nation, and Chickasaw Nation.

Definitions

The draft compact contains several water-related definitions taken verbatim from existing State statutes relating to use of water, thereby making it easier to apply current State meanings and interpretations (from State statutes, agency rules, and court cases) to such words.

Compact Area

The geographic area to which the compact would apply is concurrent with the area included within the original boundaries of the Choctaw and Chickasaw Tribal Nations over which those Tribes claimed ownership of and sovereign authority to regulate all waters. The area covers all or parts of 22 counties in southeastern and south central Oklahoma (south of the South Canadian and Arkansas Rivers, north of the Red River, and west from the Arkansas State border to the 98th meridian), so that clouds to water rights created by the Tribal claims can be resolved for the entire area.

Water Rights Administration

The Choctaw and Chickasaw Nations expressly delegate any authority they may have over water rights administration to the State. To the extent that the Tribal Nations may be able to prevail in their claim of sovereign control over at least some of the water in the compact area, this provision would eliminate the potential checkerboard administration of water rights in the 22-county area. Because the Tribal Nations had claimed ownership and authority over groundwater as well as surface water, the compact makes it clear that administration of groundwater rights will remain with the State. As part of this agreement, the Tribal Nations expressly release all claims to water rights issued by the State, including water rights of the City of Oklahoma City to Atoka Lake and McGee Creek Lake.

The draft compact states that following ratification, Oklahomans would be able to pursue additional water rights without potential claims or the payment of revenues to the Tribal Nations to release claims. The Office of the Governor is adamant that no State entities would be required to compensate the Tribal Nations for the use of water within Oklahoma.

In the compact, existing State laws and OWRB rules concerning water use are recognized by the Tribal Nations as controlling. The Tribal Nations would have input into rule changes by the OWRB (as they do now), but the role of the Tribes would be limited, allowing them to submit a proposed rule to arbitration only if the rule infringes on tribal sovereignty or allows use of water in excess of present or future needs (already prohibited under existing State law). The Tribal Nations could also protest a permit application (again, as they can now) and submit the proposed order approving a permit to arbitration, but only for very limited reasons (e.g., the findings violate rules of the OWRB, would violate a water marketing agreement, or infringe on tribal sovereignty).

Water Quality Standards Administration

The federal Clean Water Act requires all states to adopt water quality standards. Current federal law also provides that Indian tribes can be treated as states in regard to Clean Water Act program authority—such as water quality standards adoption, grants, and wastewater discharge permitting—and authorizes tribes to adopt water quality standards. The compact recognizes the possibility that the Choctaws and Chickasaws could ask the U.S. Environmental Protection Agency for recognition as a state and adopt their own water quality standards, but the compact, as drafted, would not provide independent authority for the Tribal Nations to adopt water quality standards. Instead, the Tribes agree to limitations on current authority.

There are not many tribes in the United States that have been approved to be treated as a state for water quality standards adoption purposes. However, where tribes are authorized to adopt their own water quality standards, significant problems can result for non-Tribal interests. For example, the Isleta Pueblo Indian tribe in New Mexico, which owned a small parcel of land along the Rio Grande River just downstream from Albuquerque, adopted a water quality standard for the Rio Grande that was stricter than the New Mexico State standard. The EPA subsequently required the tribal standard to be met by Albuquerque's wastewater discharge plant. The U.S. Supreme Court agreed, and as a result, Albuquerque and other industrial dischargers into the Rio Grande upstream from the Isleta Pueblo were forced to spend millions of dollars in treatment plant upgrades to meet the stricter tribal water quality standard.

The EPA has proposed tribal water quality standards to be applicable on tribal lands everywhere in the U.S. where the tribes have not adopted their own standards. Through "Core Water Quality Standards," EPA proposes to declare that a state's water quality standards do not apply to certain tribal lands, even if the tribe has not adopted their own standards. Therefore, EPA holds that it is required to promulgate standards for those areas until the tribes do so. EPA is uncertain at this time which tribal lands will qualify for tribal standards. However, if differing standards apply to various tracts of land in the 22-county compact area, another very complex checkerboard situation would be created, one much more detrimental to economic development than the water rights administration uncertainties created through Tribal claims. If the compact is ratified, this problem could be alleviated because the Choctaw and Chickasaw Nations would agree that the State's water quality standards apply in the compact area unless the Tribal Nations obtain EPA approval to adopt their own standards.

The Tribes are not willing to give up the right to adopt their own water quality standards, although they generally agree that exercising that right is only a remote possibility. However, if the Choctaws or Chickasaws decide to ask EPA to approve tribal water quality standards, the Tribal Nations agree in the compact to two major limitations on water quality standards authority.

First, the Tribal Nations agree to request authority to adopt standards only for "tribal-owned trust lands" and "restricted allotments." Under EPA's draft core water quality standards, EPA

may consider that tribal standards apply not only to tribally owned trust lands and allotments, but also to "dependent Indian communities." The Choctaws and Chickasaws agree in the compact to limit their request only to tribal trust lands and allotments, thus reducing the geographical area where tribal water quality standards could apply.

The Choctaw and Chickasaw Tribes also agreed to limit the effect of any water quality standards that are approved. Under the draft compact, the tribal water quality standard cannot impact waters on lands that are not tribal-owned trust lands or allotments. Without this limitation, the tribe could adopt a less stringent standard that could have an adverse impact on waters off tribal lands. The Tribal Nations also agree that a tribal water quality standard cannot cause economic hardship on lands that are not tribal-owned trust lands or allotments, thus eliminating potential problems where the tribal standard is more stringent (like the Isleta Pueblo situation in New Mexico). These two very significant compromises by the Tribal Nations regarding water quality standards administration are extremely valuable to the State.

Economic Development Through Water Sale Revenues

As directed by HCR 1109, any water development proposals for the Kiamichi River Basin area must be submitted to the State Legislature for consideration and contain criteria consistent with "cornerstone principles" set forth in HCR 1066 and refined by the Kiamichi Basin Working Group. The draft compact sets forth the cornerstone principles in Article 5.1 and refers to State law regarding stream water use applications, including 82 O.S. §105.12, which contains related area of origin protections.

Early on, it became clear to State and Tribal negotiators that priority and protection for in-state use of water would be a pivotal issue in any agreement to sell water out of state. To confirm that intention, Article 5.3 of the draft compact contains specific parameters for any out-of-state water sale contract, such as:

- The out-of-state contract must contain an express waiver of downstream dependency.
- The contract for out-of-state water sale must contain escalation provisions relating to price of water.
- The contract must expressly provide that groundwater (private property right under Oklahoma law) will not be used as a supply in the out-of-state sale.
- The contract must provide that water from Oklahoma will not be used solely or primarily for recreation, fish and wildlife benefits out of state.
- The contract cannot be materially amended without approval of the Oklahoma Legislature and Tribal legislatures.
- The contract must contain specific water diversion limits that clearly indicate when out-of-state taking must be reduced or terminated to prevent undue diversions during drought episodes.

The draft compact provides in Article 5.3(b) that the State will get 50 percent of the net revenues for an out-of-state water sale while the Tribes split the other 50 percent. Comments have been made that this split of revenues gives too much value to the Tribal claims. However, the compact, as drafted, would provide substantial non-revenue benefits and value to the State.

Aside from the obvious benefit ensuring that no Oklahoman would be compelled to pay or compensate the Choctaw and/or Chickasaw Tribes for the use of water in southeast Oklahoma, it is difficult to attribute a specific monetary value to removing the cloud caused by Tribal water rights claims. Limiting the analysis to economic benefits alone and assuming the current water rights disagreement reduces economic activity in southeast Oklahoma by one-half over the next 100 years, resolution of the issue could be worth hundreds of millions of dollars to Oklahoma.

And, as mentioned, eliminating potential conflicts over water quality standards is of similar, if not greater, economic value. If the assumption is made that the value of the State having both primary water rights and water quality administration is each at least equal to the revenues from a water sale, it becomes clear that the State would receive substantially more than 50 percent of the overall value of the compact.

Another indirect monetary benefit of compacting with the Tribes is avoidance of adjudication and litigation costs. In several western states, those governments have had to provide all or most of the expenses related to water rights adjudication involving Indian tribal claims. The Gila River adjudication in Arizona has been active for more than 20 years with nearly 20,000 named claimants. In view of the extent and geographic area subject of the Choctaw and Chickasaw Nation claims, avoiding extremely complex and expensive litigation should be considered a valuable benefit to Oklahoma.

Compact Commission

The compact, as drafted, would establish a compact commission whose primary function would be to administer an out-of-state water sale contract. The compact commission would have an equal number of State and Tribal representatives, similar to the four interstate stream compacts to which the State of Oklahoma is a party with surrounding states. Although the commission would be an intergovernmental entity, the Office of the Governor was adamant that the compact commission be required to comply with the State's Administrative Procedures Act, Open Meetings Act and Open Records Act (Article 7.7 of the draft compact).

Contrary to some comments and media reports, the compact commission would have nothing to do with water rights administration or water quality standards administration. In addition, the compact commission would not make decisions on expenditures of water sale revenues. Instead, the commission would receive gross revenues from the out-of-state sale of water, and then build (and consequently obtain and retain ownership of) all pumps, pipelines, and other structures required to make that water available to the out-of-state user, pursuant to contract terms. In this regard, Article 5.3(e) of the compact specifically reiterates that an out-of-state water sale contract must be approved by the Oklahoma Legislature. Furthermore, additional reservoirs would be constructed if, and only if, the Oklahoma Legislature approved such new reservoirs, again contrary to some reports.

The compact commission would be given authority to issue bonds to construct infrastructure needed to supply water for an out-of-state sale. However, the compact provides additional Oklahoma legislative oversight by making the issuance of such bonds subject to approval of the State's Executive and Legislative Bond Oversight Commissions. In other words, in addition to full Oklahoma legislative authority related to approval of an out-of-state water sale contract (including all parameters and requirements thereof), the issuance of bonds for infrastructure to supply water for the contract is subject to separate State oversight.

Contract Approval and Ratification

As indicated at the beginning of this section, the draft compact expressly contemplates and requires full legislative approval, not just approval by the Joint Committee on State-Tribal Relations. In addition, the Secretary of Interior and/or the full U.S. Congress must ratify the compact agreement before it could become effective.

SOUTHEAST OKLAHOMA WATER AVAILABILITY STUDY

As directed by HCR 1109, the OWRB and Corps of Engineers initiated a long-term, detailed study of southeast Oklahoma's water resources and hydrology in July 2001. Although the multi-phase study is projected to take up to 10 years to complete (depending on funding availability and needs), project sponsors indicated an immediate desire for specific water-related information that would enable them to properly evaluate the initial proposals of the two short-listed entities and negotiate initial fundamental terms of prospective water agreements with Oklahoma City and north Texas. Of most urgent need was a determination of available water under various transfer scenarios with all protective assumptions in place as outlined in the Kiamichi Plan.

The first stage of the investigation, completed in February 2002, focused on the utilization of flows below Hugo Lake and just downstream of the confluence of the Little and Mountain Fork Rivers. Crucial to this phase was development of a computer model, the Corps' SUPER Model, to estimate water available under a range of policy and planning scenarios, including incorporation of protective measures. Results of various model "runs" were used by representatives of the State, Choctaw/Chickasaw Tribes, OCWUT and NTWA to structure specific terms of the water marketing agreements.

The SUPER Model is a suite of computer programs written specifically for use in the Corps' Southwestern Division to model regulation of multi-purpose reservoir systems. It was developed over a 30-year period as a planning tool to perform period-of-record analysis and evaluate changes in operational scenarios. This complex, yet flexible, model can accurately simulate flood control and water conservation pool operations and releases, including those associated with hydropower, water supply, water quality, diversions, and returns. It also has the capability to develop unregulated conditions models, simulating the existence of some or all existing and/or proposed reservoir projects. Besides system modeling, SUPER has the ability to perform economic analyses of impacts among proposed plans. It can also provide a wide variety of output from which to evaluate scenarios, including tabular or graphical formats of hydrographs, duration plots, and frequency curves at all reservoirs and control points within a system model.

In addition to the evaluation of alternative regulation plans for multi-purpose reservoir systems and individual reservoirs, the SUPER Model has been utilized for the hydrologic analysis and economic screening of proposed additions to a reservoir system or reallocation of storage at existing lakes, evaluation of risk in emergency reservoir situations, and various other planning projects. For the Southeast Oklahoma Water Availability Study, an adapted SUPER Model used for the Red and Trinity River Basins was applied with a period of record from 1940-1990. The model proved invaluable in the analysis and development of system operational constraints and policy in the stream water basins of southeast Oklahoma.

To consult with the Corps on model and water transfer scenario development and provide a "sounding board" on potential proposals discussed in separate informal negotiation sessions with both OCWUT and NTWA, the Choctaw and Chickasaw Nations retained an independent water resources and environmental consulting firm, Jones and Stokes, from Sacramento, California. Both the consultants and Corps modelers fine-tuned the model to fit potential water utilization plans while maintaining consistency with the fundamental protective criteria and principles.

Initial assumptions recognized by the Corps modelers and Tribal consultants in model adaptation and development were stringent assurances to protect water supply, in-stream flow and reservoir operational requirements for fish and aquatic life (including endangered species), waterfowl habitat, and recreational uses, such as fishing and hunting. Receiving special

attention was protection of future water supply from Sardis and Hugo Lakes. Also receiving priority in relation to potential Texas water supply transfers below Hugo Lake was a future diversion from the Kiamichi River to Oklahoma City and central Oklahoma. However, the model assumed that neither diversion would be allowed to draw down Sardis or Hugo below prescribed levels that fully protect recreational uses. Lake level management plans for the two lakes, developed and recommended by the Oklahoma Department of Wildlife Conservation (ODWC), were built into SUPER.

Phase I of the Southeast Study also included an analysis of historical Kiamichi River flows to determine the water supply yield that could be promised to North Texas water users during the most severe drought of record without reducing the value of Oklahoma water resources. Terms would be added to a prospective water contract with NTWA to protect Sardis and Hugo reservoir levels, future water supply from Sardis and Hugo, and future diversions from the Kiamichi River to Oklahoma City via the Atoka Pipeline. Similar protective measures for reservoir operations would be specified for Pine Creek (on the Little River) and Broken Bow Lake (on the Mountain Fork River).

Various aspects of the Southeast Water Availability Study and model development, as they relate to protective assumptions and quantities of water potentially available for sale and transfer under various scenarios, are presented below.

Kiamichi River Operations

From 1925 to 2000, the annual volume of Kiamichi River runoff flowing into Hugo Lake has fluctuated from less than 500,000 acre-feet in a few dry years to more than 3,000,000 acre-feet in the wettest years. The minimum runoff recorded during the period is 360,000 acre-feet (1963) and 450,000 acre-feet (1956). Hugo Lake inflow will be greater than 830,000 acre-feet in 90 percent of the years. The historical Kiamichi River runoff was used to simulate Sardis and Hugo Lake reservoir operations with the proposed ODWC lake level management plans in place and future water supply reserves of 20,000 acre-feet/year for each lake. Other assumptions included a future diversion at Antlers to supply Oklahoma City's needs, a minimum in-stream flow requirement, and "tapering" (instead of rapid) flood control releases at the conclusion of flood control operations to provide for extended periods of diversions below Sardis and Hugo.

With these assumptions in place, SUPER ran daily simulations for the historical period of record to determine water potentially available from the Kiamichi Basin to NTWA and OCWUT during the driest years. For 1956, one of the driest years on record, model results determined that releases from both Sardis and Hugo to augment supply for either entity would be prohibited due to maintenance of lake levels required to protect recreation and wildlife benefits.

Regarding the simulated Oklahoma City water supply diversions at Antlers, the pipeline was assumed to have a capacity of 200 cubic feet per second (cfs); a minimum in-stream flow requirement of 50 cfs, or 36,200 acre-feet/year, was also established. Diversions were allowed in the February to early June period and again in December. The total annual diversions in the dry year of 1956 were simulated to be 50,000 acre-feet (45 mgd). Diversions to Oklahoma City would usually be more than allowed in 1956, so 50,000 acre-feet was estimated as the dependable yield to Oklahoma City. Again, a 50 cfs in-stream flow requirement was assumed to protect the Kiamichi during dry periods. Historical data indicates that the Kiamichi River at Antlers frequently drops below 50 cfs during the summer months between runoff events. This minimum flow will prevent the potential Oklahoma City diversion from reducing streamflow during times of natural low flow.

For the simulated Hugo releases and water supply diversion below Hugo, a required minimum flow of 25 cfs was built into SUPER at the mouth of the Kiamichi before it flows into

the Red River at the State border. With a 250-cfs capacity pipeline, the simulated water supply diversions totaled about 104,000 acre-feet/year, although additional diversions could be possible through a slightly larger pipeline or with additional draw-down of Hugo Lake during the October-December period. No change in the monthly pattern of water quality releases was simulated and no releases for Hugo were made specifically for the NTWA water supply diversion.

In summary, these model runs simulate the future daily operations of Sardis and Hugo with the historical daily runoff patterns to evaluate future potential water supply diversions for Oklahoma City and north Texas. Kiamichi River water resources are protected by in-stream flow requirements and lake level management plans and only surplus water is diverted from the river at Antlers and below Hugo for water supply purposes. This is the most protective reservoir operation alternative because no additional reservoir releases are made for the downstream water supply diversions.

Phase I Diversions—Kiamichi River below Hugo Lake

Discussions with NTWA officials indicated that the potential water transfer would likely occur in phases as the water supply needs of the north Texas region increase over time. NTWA expressed a desire to implement an initial phase as soon as possible to supply their customers with 120,000 acre-feet/year of supply during the driest years. This phase was simulated in the model with construction of a diversion pipeline of 250 cfs below Hugo Lake near the mouth of the Kiamichi River. Because the Oklahoma City diversion would not occur for at least 20 years, and the local water supply needs supplied by Sardis and Hugo are not assumed to reach full capacity for a similar amount of time, Kiamichi diversions to NTWA will be greater during Phase 1, with the ability to reduce them as needs develop in Oklahoma.

Because OCWUT officials do not anticipate a need for Kiamichi River supply for another 20 years, NTWA water supply diversions below Hugo were simulated assuming the Oklahoma City diversion has not been constructed. A 250-cfs pipeline capacity was assumed to accommodate summer water quality releases and allow the pipeline to be virtually full during the months of June, July, August, and September. The local water supply usage at both Sardis and Hugo was assumed to be 10,000 acre-feet/year. The minimum annual water supply diversion for NTWA was simulated to be 111,000 acre-feet (in 1956), the 90 percent water supply volume was 124,000 acre-feet/year, and the average water supply diversion was 153,000 acre-feet/year. In a repeat of driest year conditions, the potential release of additional water supply from Sardis or Hugo to supply a NTWA diversion of approximately 120,000 acre-feet would lower Hugo Lake about one foot.

Phase II Diversions—Kiamichi and Little Rivers near Idabel

Phase II of the NTWA proposal assumes an increase in north Texas water supply needs to approximately 180,000 acre-feet/year. Assuming full Oklahoma City diversions and full Sardis and Hugo local water supply diversions, model runs determined that this entire volume is not possible from the Kiamichi River below Hugo in most years, even with an increased assumed pipeline capacity of 500 cfs. The simulated Oklahoma City diversions had a minimum annual volume of 40,000 acre-feet, a 90 percent water supply volume of 68,000 acre-feet/year, and an average water supply diversion volume of 94,000 acre-feet/year. The simulated minimum annual NTWA diversion was 123,000 acre-feet, the 90 percent NTWA diversion was 146,000 acre-feet/year, and the average NTWA diversion was 224,000 acre-feet/year. Additional

diversions from the Little River would be required in Phase II of the NTWA proposal, according to the simulation.

Simulated results for Pine Creek Lake operations for 1956 determined a local future water supply of 50,000 acre-feet/year. Similarly, Broken Bow Lake had a simulated local future water supply of 50,000 acre-feet/year with minimum releases for fish habitat benefits (in-stream flow and cool temperatures) of approximately 150 cfs throughout the summer. Diversions from the Little River at Idabel during 1956 were simulated with an assumed pipeline capacity of 250 cfs and a capacity of 500 cfs at the Kiamichi River below Hugo. Full diversions were assumed for about 10 days at the end of February, while no diversions were simulated in late February and early March because diversions at Hugo consumed the full pipeline capacity. Full Little River diversions of 250 cfs were made from the end of March through May. Flows in the Little River were insufficient to allow diversions from June through October. Some diversions were simulated during four small storm events that occurred in November and December. Total diversions from the Little River were 59,000 acre-feet in 1956.

Simulated annual NTWA water supply diversions from the Kiamichi River were assumed to fill the 500-cfs capacity pipeline. A supplemental diversion from the Little River below Pine Creek Lake near Idabel was simulated with an assumed pipeline capacity of 250 cfs. Diversions from the Little River near Idabel were limited to the remaining capacity at the modeled Kiamichi River intake below Hugo, the Idabel capacity of 250 cfs, or the minimum flow of 50 cfs specified at Idabel. No diversions were allowed if the flow at Idabel was less than 50 cfs and the diversion was not allowed to lower the flow below the specified 50-cfs minimum flow. The minimum simulated NTWA annual diversion was 182,000 acre-feet, the 90 percent water supply diversion was 212,000 acre-feet/year, and the average water supply volume was 265,000 acre-feet/year. Additional water supply diversions from the Little River would be possible if some of the assumed local water supply from Pine Creek Lake was sold to NTWA during the driest years.

Phase III Diversions—Kiamichi and Little Rivers

To meet increasing water supply demands during Phase III of the NTWA planning horizon, SUPER modeled annual diversions from the Kiamichi and Little Rivers of 320,000 acre-feet. Diversions from the Kiamichi River were simulated to fill the 750-cfs capacity pipeline. The Little River diversion below Pine Creek Lake, near Idabel, was simulated with an assumed pipeline capacity of 500 cfs. In this model run, an additional pipeline with an assumed capacity of 250 cfs extended to the Mountain Fork River below Broken Bow Lake, downstream of Eagletown. Diversions from the Little River, near Idabel, were limited to the remaining capacity at the Kiamichi River intake below Hugo, the Idabel capacity of 500 cfs, or the minimum flow of 50 cfs specified at Idabel. Diversions from the Mountain Fork were limited by the pipeline capacity of 250 cfs, the remaining pipeline capacities at Hugo or Idabel, or the assumed minimum flow of 50 cfs at Eagletown.

The minimum simulated NTWA annual diversion from these combined diversion locations during Phase III was 274,000 acre-feet, the 90 percent water supply diversion was 346,000 acre-feet/year, and the average water supply diversion during Phase III was 431,000 acre-feet/year. No releases were assumed from Pine Creek or Broken Bow Lakes specifically to augment the NTWA water supply diversions. Additional water supply diversions from the Little River would be possible if some of the assumed local water supply from Pine Creek and Broken Bow Lakes was sold to NTWA during the driest years.

Conclusions

Preliminary water transfer agreement terms proposed by NTWA and modeled by SUPER included a three-phase implementation to match the growing demands of the north Texas region. During Phase I, a 250-cfs pipeline to the Kiamichi River below Hugo Lake could provide a minimum dependable water supply of 120,000 acre-feet/year. During Phase II, a 500-cfs pipeline to the Kiamichi River and a 250-cfs pipeline to the Little River, near Idabel, could provide a minimum dependable water supply of at least 180,000 acre-feet/year. During Phase III, a transfer system comprised of a 750-cfs pipeline to the Kiamichi River, 500-cfs pipeline to Idabel, and 250-cfs pipeline extended to the Mountain Fork, below Eagletown, could supply a minimum dependable water supply of at least 320,000 acre-feet/year.

As mentioned, to provide full protection for water resources of the Kiamichi and Little Rivers (including Mountain Fork River) water resources, the protective in-stream flow requirements, lake level management plans, reservoir operations, and drought contingency rules assumed in the SUPER model runs are compulsory elements of any potential water supply contract with OCWUT and/or the NTWA. In particular, no specific reservoir releases would be made for NTWA that could potentially compromise the associated recreational and wildlife benefits of these valuable State reservoirs.

In conclusion, early results from modeling analyses accomplished during the initial phase of the Southeast Oklahoma Water Availability Study verify that sufficient water is available for potential sale/transfer without adverse effects to existing and future local supply and recreational needs.

SUMMARY OF PROPOSALS

As set forth in HCR 1109, the OWRB was directed to analyze and accept proposals for the development of the Kiamichi River Basin for recommendation to the Oklahoma Legislature. Individual proposals are required to be consistent with all principles and criteria established by the Kiamichi River Basin Water Resources Development Plan.

Cornerstone Principles for Proposals

Summarized and consolidated, the following are the criteria and principles set forth in the Kiamichi River Basin Water Resources Development Plan:

1. Future use of water by local citizens and entities shall be the highest priority and shall be protected by implementing stream system of origin protection provisions of State law and in setting aside a sufficient amount of water from water supply reservoirs in the basin area;
2. The present and future needs for water by all Oklahomans shall be considered the next highest priority;
3. Appropriate lake level management plans and release policies, developed by the Oklahoma Department of Wildlife Conservation, shall be implemented for the use of water from Sardis Lake, and shall include flexibility for adjustments due to future sedimentation;
4. Financing opportunities for water and wastewater infrastructure and related economic development projects within the basin shall be optimized;
5. Obligations of the State, and municipal trusts to the United States for repayment of construction and maintenance costs of the water supply storage in the basin area shall be addressed;
6. The integrity of the Kiamichi River shall be protected; and
7. Wildlife management and waterfowl areas adjacent to reservoirs shall be protected and appropriate mitigation measures will be implemented.

As noted, the OWRB thoroughly reviewed the three responses to the Request for Qualifications received in December 2000. The Board's staff, along with representatives of the Choctaw and Chickasaw Nations conducted lengthy discussions and negotiations with officials from both the North Texas Water Agency and Oklahoma City Water Utilities Trust during 2001. On January 11, 2002, Howard Barnett, Choctaw Chief Pyle, and Chickasaw Governor Anoatubby announced that negotiations with the NTWA had broken down, primarily due to disagreements related to valuation of the water and protections required by Oklahoma/Tribal negotiators pursuant to terms of a potential out-of-state water sale contract.

The following is a summary of preliminary contract provisions concerning the use of water from the Kiamichi, Mountain Fork and Little River Basins, as well as an explanation of how those provisions contained criteria consistent with the principles established by the Kiamichi River Basin Water Resources Development Plan.

North Texas Water Agency Proposal

General

The North Texas Water Agency response to Request for Qualifications, described earlier in this report and as more fully developed and set forth in the attached draft contract, indicates that

NTWA seeks a long-term commitment to utilize river flows (not water stored in reservoirs for public water supply use in Oklahoma) from the Kiamichi, Little River and Mountain Fork Rivers. In general, the NTWA would be provided only that water flowing unused out of the State of Oklahoma into the Red River or State of Arkansas. In return for the commitment to make the water available pursuant to the terms of a contract, the NTWA would pay -- in addition to all costs of pumps, pipelines, easements, overhead, maintenance, and related water transfer infrastructure -- a "commodity charge" of several billion dollars over the term of the contract. As shown in Figures 5 and 6, earlier in this report, the NTWA proposal contemplates two possible diversion points: 1) on the Kiamichi River downstream from Hugo Lake in Choctaw County, 2) on the Little River just downstream from the confluence of the Mountain Fork River in McCurtain County. The very significant advantage for Oklahoma in having the points of diversions located downstream from large storage reservoirs is that otherwise unused excess flows being released from the reservoirs for flood control, water quality, fish and wildlife, recreation and other purposes can be captured and utilized for the water sale, with little or no impact to Oklahoma.

Parties to NTWA Contract

Texas

As discussed earlier in this report, the NTWA submitted a response to the Request for Qualifications to use water from southeastern Oklahoma. Due to provisions of Texas State law, the Alliance formally organized into the North Texas Water Agency. The areas served by the NTWA are included in the area designated as Region C of the Texas Water Plan. The current population of Region C is approximately five million, although projections indicate that the area's population will double by 2050. Members of the NTWA involved in the discussions and negotiations for a contract included:

- North Texas Municipal Water District (entity involved in the 1992 contract negotiations, serving areas north and east of Dallas),
- City of Dallas,
- City of Irving,
- Tarrant Regional Water District (serving Forth Worth area), and
- Upper Trinity Regional Water District (serving areas north of Dallas).

Oklahoma

As recommended in the Kiamichi River Basin Water Resources Development Plan, approved by the Legislature in HCR 1109, officials from the State of Oklahoma and officials from the Choctaw and Chickasaw Nations drafted a State/Tribal Water Compact for presentation and approval by the Oklahoma Legislature. The compact, as drafted, would create a State-Tribal Intergovernmental Compact Commission (STICC) to administer a water sale contract. The STICC would be the legal entity to enter into the contract with the NTWA under the scenario envisioned by the drafters of the compact and those involved in recent preliminary negotiations for a water sale contract. As specified in the draft compact, the State of Oklahoma would have equal representation on the STICC with the Choctaws and Chickasaws. State members of the STICC would be appointed by the Oklahoma Governor to four-year terms with advice and consent of the Senate. Criteria for State members would be set forth by law adopted by the Oklahoma Legislature.

Amount Of Water Requested By NTWA—Comparisons

Total Requested

The total quantity of water requested by the NTWA to be made available from the Kiamichi River and the Little River and Mountain Fork River Basins is 320,000 acre-feet/year.

Comparisons

The following hydrologic information provides an interesting perspective of the amount of water requested by NTWA:

1,740,164 acre-feet/year = average flow of the Kiamichi River Basin
2,442,776 acre-feet/year = combined average flow of the Little/Mountain Fork Rivers
4,182,940 acre-feet/year = average annual flow from the three basins

The Texas request equals about seven percent of the total average amount of water flowing unused out of the three basins.

In addition to the three basins considered in the NTWA proposal, it should be noted that there are three other major river basins within the 22-county compact/Tribal area of southeast Oklahoma, each of which cold supply a significant amount of the NTWA's needs without impacting future needs in Oklahoma. These flows of these basins are:

232,404 acre-feet/year = average annual flow of Blue River basin
364,172 acre-feet/year = average annual flow of Clear Boggy basin
1,584,112 acre-feet/year = average annual flow of Muddy Boggy basin
2,180,688 acre-feet/year = average annual flow of the other three southeast basins

Together, the average annual flow of the six major basins in southeastern Oklahoma is 6,363,628 acre-feet. Additional perspectives on these amounts of water are presented below.

- Annual water use in six major basins = 117,750 acre-feet/year (2 percent of 6-basin total)
- OKC/Tulsa combined water use (1998) = 274,518 acre-feet/year (4 percent of 6-basin total)
- Statewide water usage (1995) = 1,995,840 acre-feet/year (31 percent of 6-basin total)
- New York City water usage = 1,612,800 acre-feet/year (25 percent of 6-basin total)

As evident, the six major river basins in southeast Oklahoma produce, in an average year, more than three times the amount of water than the entire State of Oklahoma uses annually for all purposes (municipal water supply, industrial, irrigation, etc.). The flows of the six river basins could support three cities the size of New York City in southeast Oklahoma and have sufficient water supplies left over for other purposes. Average flows of the Kiamichi River alone are sufficient to supply all of New York City's needs.

Phases of the NTWA Proposal/Plan

The NTWA proposes to utilize water from southeast Oklahoma in phases. The phases proposed are in five-year increments (from 2012 to 2022) and are based on the needs of the NTWA members and incorporates the time needed to build infrastructure necessary to physically transport the water from Oklahoma to Texas. These three phases, described below, reflect the

latest formal proposal from NTWA and draft contract between the State-Tribal Intergovernmental Compact Commission and NTWA.

- Phase I, securing 120,000 acre-feet/year, would be scheduled for full use by 2012. This amount could be made available at a diversion point on the Kiamichi River downstream from Hugo Lake and upstream from the confluence of the Kiamichi and Red Rivers. The water would be transported by a pipeline with a capacity of at least 250 cubic feet per second (cfs) south across the Red River to the point of delivery where the NTWA would be responsible for all pipelines, pumps, easements and other costs for infrastructure within the State of Texas to distribute water to the NTWA members.
- Phase II, for an additional 40,000 acre-feet/year, would divert water from the Little River (upstream of its confluence with the Mountain Fork River), as well as the Kiamichi, bringing the total to 160,000 acre-feet/year. Water secured through this phase would be available by 2017 and transported by a second parallel pipeline having a capacity of 250 cfs or though a pipeline previously oversized as part of Phase I at 500 cfs.
- Phase III, securing an additional 200,000 acre-feet/year, would bring the total amount of water from southeast Oklahoma to 320,000 acre-feet/year. In this phase, either one or two diversion points would be located on the Little and/or Mountain Fork Rivers prior to exiting Oklahoma into Arkansas. The water could be transported by pipeline or parallel pipelines having a total capacity of 500 cfs from the point of diversion westward along the U.S. Highway 70 corridor to a point south of Hugo, where it could run parallel to existing pipeline(s) south across the Red River to a point of delivery in Texas. Concerns about the effect of diverting flows from the Little River before it enters Arkansas are addressed in a discussion of the Red River Compact issues below. This phase, as proposed by NTWA, would be completed by 2022.

Protections For Oklahoma Under the NTWA Proposal

General

It was clearly provided in the Kiamichi Plan cornerstone principles, that the use of water for Oklahomans, particularly local uses in the basins of origin, should be the primary focus and goal of any development plans submitted to the Oklahoma Legislature. The NTWA proposal, as more specifically fleshed-out in the draft contract negotiated with the NTWA, will provide those protections.

Downstream Dependency Waiver

The issue of potential "downstream dependency" claims by Texas has elicited much concern. Professor Drew Kershen, of the University of Oklahoma Law School, contracted with the Choctaw Nation to review and provide an opinion on the matter. On November 11, 2001, Professor Kershen provided his written opinion to Governor Keating, Chief Pyle, and Governor Anoatubby.

Essentially, Professor Kershen advised that the notion of "downstream dependency" is not a legally-recognized concept or principle in water law. However, he reviewed water law principles as they could relate to the potential use of water from Oklahoma by entities in north Texas and whether such entities could somehow breach or ignore contract obligations and requirements and take or continue taking water in spite of clear contractual provisions to the contrary.

Professor Kershen concluded that north Texas entities could waive all claims to downstream dependency or other claims which could allow north Texas entities to continue to use water contrary to contractual provisions (brought about my such mitigating issues as severe drought,

unanticipated growth and need for water, etc.). Professor Kershen also pointed out that when faced with controversies between states as to use of water, the principle of equitable apportionment could be used by the U.S. Supreme Court. That principle says that if there is no written agreement between states, the state that has a need for the use of water and has already been using the water would probably prevail over a state that has elected not to use the water flowing through it. In other words, to avoid a claim at some time in the future by Texas concerning the need for water, Oklahoma would be better off by having a written contract showing use of the water for a water sale, rather than just letting the water continue to flow unused into the Red River.

With respect to downstream dependency, the States of Oklahoma and Texas are bound by the Red River Compact, an existing written agreement regarding the apportionment of water in the Red River Basin, including the waters of the Kiamichi River and Little River. In this situation, the apportionment provisions of the Red River Compact would control the use of water from Oklahoma to Texas and no Texas entity could legally claim more water than is apportioned to Texas under the Compact, regardless of the needs that may develop in Texas.

The draft State/Tribal Water Compact specifically provides that any out-of-state water sale contract must contain a provision that waives any claim the buyer may raise that concerning downstream dependency, such as claims for public health, safety and welfare, drought conditions, etc. Accordingly, the draft NTWA contract contains an express condition whereby the NTWA waives any and all claims to downstream dependency or any other kind of claim that would result in use of water not in compliance with the contract provisions, both during the contract period and after contract termination.

Present And Future Needs Of Local Areas In Oklahoma—Water Supply From Existing Reservoirs

The project proposed by the NTWA would tap into unused flows from the Kiamichi, Little and Mountain Fork River Basins; major reservoir storage allocated to water supply in those basins would not be utilized and thus available for present and future uses by Oklahomans. There are four major reservoirs in the three basins. The yield of water available from water supply storage is listed for each:

• Sardis Lake (Kiamichi River)	=	156,800 acre-feet/year	= 140 mgd
• Hugo Lake (Kiamichi River)	=	64,960 acre-feet/year	= 58 mgd
• Pine Creek Lake (Little River)	=	94,080 acre-feet/year	= 84 mgd
• Broken Bow Lake (Mountain Fork)	=	196,000 acre-feet/year*	= 175 mgd
• Total	=	511,840 acre-feet/year*	= 456 mgd

**107,000 acre-feet/year of storage (yielding approximately 137,521 acre-feet/year, or 122 mgd, of water) was recently reallocated to support Mountain Fork trout fishery releases, leaving 374,319 acre-feet/year in total water supply yield in the four lakes*

Of the 511,840 acre-feet/year of water supply yield supplied by the four reservoirs, the OWRB has issued permits to appropriate 116,282 acre-feet/year for use by Oklahomans, leaving approximately 395,558 acre-feet/year dependably available for additional use by Oklahomans from those reservoirs.

Because the NTWA proposal does not seek to utilize storage from Sardis Lake, the entire Sardis water supply storage is available for Oklahomans. To protect local uses of Sardis water supply, the OWRB adopted a rule in 1999 declaring that for permit applications to withdraw water from Sardis Lake water supply storage, 20,000 acre-feet of water shall not be available for appropriation unless the applicant's use is for the 10-county area around Sardis (LeFlore,

McCurtain, Pushmataha, Latimer, Haskell, Choctaw, Pittsburg, Coal, Atoka, and Bryan Counties). The NTWA proposal would not impact or reduce the set-aside protection set forth in the Board's rule.

In addition, the NTWA proposal to utilize river flows, rather than water supply storage, for the requested 320,000 acre-feet/year ensures protection for other storage uses (in addition to water supply). For example, the hydropower use of Broken Bow Lake is protected, as are releases to maintain the downstream Mountain Fork River trout fishery.

Present and Future Needs of Oklahomans -- Other Water Available from River Basins

As mentioned, there is an abundant amount of raw water available in the six basins in southeast Oklahoma to protect the present and future needs of all Oklahomans. In addition to the reservoir water supply available for use by Oklahomans in the three basins proposed for limited use by the NTWA, there are significant amounts of water available from other flows in the region. Atoka Lake and McGee Creek Lake, operated by Oklahoma City and located on the Muddy Boggy system, also provide supply for local use. If needs for consumptive water use in Oklahoma increase beyond the amount that can be supplied from water supply storage at the six major reservoirs in the southeast, storage set aside for other purposes could be reallocated to water supply and additional storage could be created through construction of new reservoirs in the region.

Present and Future Needs of Oklahomans -- Water for Central Oklahoma

A computer analysis of flows in the Kiamichi River Basin upstream from Hugo Lake indicates that at least 50,000 acre-feet/year of water is available for use from flows near Antlers during the driest year of record (1956). This amount is available without the need for additional reservoirs or the use of Sardis Lake (except for releases required to maintain the lake level management plan recommended by the ODWC). The Corps' computer simulation of streamflows was programmed to terminate diversions when flows fell below 50 cfs; this water could be diverted by the OCWUT approximately 20 miles to McGee Creek Lake.

As described, the OCWUT has expressed interest in utilizing water from the Kiamichi River Basin as a long-term future source for central Oklahoma. The OCWUT currently has in place the pumps and pipelines to transport water from McGee Creek Lake to Atoka Lake, and from Atoka Lake to terminal storage in Lake Stanley Draper in southern Oklahoma County. With proper agreements, the OCWUT could authorize use of its pumps and pipelines to transport water to a pipeline, allowing water to flow into Lake Thunderbird for use by the City of Norman and entities served by the Central Oklahoma Master Conservancy District. Additional agreements could be executed to provide supply to other central Oklahoma communities, including Edmond and those affiliated with the Central Oklahoma Water Resource Authority (Calumet, Yukon, El Reno, Mustang, Okarche, Piedmont, and Union City).

As evident, the NTWA proposal would not affect present or future needs in central Oklahoma.

Lake Level Management Plans

- Sardis Lake: The NTWA proposal would have no impact on Sardis Lake levels. Therefore, a lake level management plan to protect the existing fishery use of Sardis Lake (and resultant economic benefit from tourism and recreation) can be implemented without affecting the water made available to the NTWA.
- Hugo Lake: Computer simulations of water diversions from a point located downstream from Hugo Lake dam result in minimal impacts to lake levels. The Corps of Engineers

operated a seasonal pool plan at Hugo from 1995 through 2000, increasing the lake elevation to 409 feet mean sea level during the spring/summer period, then lowering the level to 404.5 feet during the remainder of the year. Some local citizens support a plan to maintain a target lake level of 409 feet, which would require a lake operations analysis by the Corps of Engineers. Protection of wildlife management areas and mitigation for any wildlife management areas inundated by permanently increasing the target lake level would be required in any change to the plan. Preliminary estimates indicate that increasing the lake level to 409 feet could yield an additional 80,000 acre-feet/year of water supply.

In addition, Hugo Lake is operated according to original Corps' design plans to release an average of 90 million gallons per day (equivalent to 100,980 acre-feet/year) for water quality. The original plans are unclear whether the water quality releases are intended to improve the quality of water in the Kiamichi River downstream from Hugo Lake or the quality of the Red River downstream from the confluence of the Kiamichi River, or both. Public concerns have been expressed that any reduction in water quality releases from Hugo Lake may cause higher chloride water in the Red River to be spread over low-lying farmlands along the Red River during floods. However, during floods, the chloride content of the Red River is reduced due to dilution from increased runoff. Furthermore, during normal flows, preliminary water quality information indicates no detectable difference in water quality on the Red River upstream and downstream from the confluence with the Kiamichi River. As a result, it appears that Kiamichi River flows, especially Hugo Lake water quality releases, have no impact on the quality of water in the Red River or on the dilution needs of industries currently discharging into it. Recent discussions with Corps of Engineers staff reveal that concerns about flow along the Red River downstream from Denison Dam at Lake Texoma primarily involve the endangered least tern, a bird species that nests on islands within the Red River channel. Higher flows protect the islands from predators, such as coyotes. Releases of high quality Kiamichi River water from Hugo Lake are not required to augment Red River flows for protection of the least tern habitat. Lower quality Lake Texoma water could be substituted to provide such protection. Use of the water quality releases for water supply by NTWA will require environmental studies and evaluation by the Corps of Engineers, which are contemplated by the NTWA proposal.

Integrity of the Kiamichi River

Concerning the original cornerstone principle for development of the Kiamichi River pertaining to protection of the River's integrity, the U.S. Fish and Wildlife Service has identified several endangered species in the Basin area. At least one aquatic species, the Ouachita Rock Pocketbook mussel, has been found in segments of the Kiamichi River. It was the view of the HCR 1066 Working Group, in 1999, that development of the Kiamichi River should not result in the endangerment of existing species or the addition of species to the threatened/endangered lists.

The Fish and Wildlife Service has not conducted a comprehensive study of the habitat requirements of the Rock Pocketbook mussel, and therefore has not determined the flow or temperature of water that will sustain or lead to recovery of the species. Computer simulations of the Kiamichi River flows upstream from Hugo Lake were programmed to provide a 50-cfs minimum flow factor in calculating the amount of water available for the NTWA proposal. That in-stream flow amount was based on similar in-stream flow levels set to protect endangered species in other states. Simulated diversions by Oklahoma City were programmed to terminate when flows fell below 50 cfs. Because that flow amount has not yet been confirmed, an

environmental study must be conducted prior to determination of the amount of water available from a downstream river diversion.

The computer simulation to confirm water availability from the Kiamichi River at a diversion point located downstream from Hugo Lake included a minimum flow factor of 25 cfs, whereby simulated diversions for the NTWA were terminated to allow 25 cfs to flow past the diversion point downstream into the Red River. As indicated below, an environmental study would be conducted to confirm that the 25-cfs minimum flow is appropriate to protect the integrity of the Kiamichi River downstream from the point of diversion and the Red River downstream from its confluence with the Kiamichi River.

Integrity of the Little River and Mountain Fork River

Although no information has been provided to indicate that there are endangered species in the Little River upstream or downstream from the confluence with the Mountain Fork River, computer simulations were run to analyze water availability in those rivers. Similar to the Kiamichi River flow simulations, the Little River and Mountain Fork computer simulation was programmed for a minimum flow factor of 50 cfs and diversions were terminated when the flow fell below the prescribed level. Again, there has been no study to determine if any endangered species exist in these areas or subsequent flows required to prevent losses or enable recovery. Such an environmental study will be required before final quantification of water availability from the Little and Mountain Fork Rivers.

Red River Compact Compliance

The Red River Compact is an agreement among the States of Arkansas, Louisiana, Texas and Oklahoma to apportion the waters of the Red River and its tributaries. The Compact was adopted in 1978 by the State negotiation teams, approved by the Oklahoma Legislature and the other three states in 1979, and finally ratified by Congress in 1980.

Regarding the apportionment of the waters that flow from the southeast corner of Oklahoma to Arkansas, the Compact provides in Section 5.03 that sub-basin 3 of Reach II includes the Little River and its tributaries above Millwood Dam. Tributaries of the Little River in Oklahoma include the Mountain Fork River (where Broken Bow Lake is located) and Glover River (on which Lukfata Reservoir is authorized but not funded by the federal government). The headwaters of Millwood Reservoir are located in Arkansas less than 10 miles from the Oklahoma-Arkansas border.

Section 5.03(b) of the Red River Compact provides that Oklahoma and Arkansas shall have free and unrestricted use of the water in sub-basin 3 within their respective states, subject to the limitation that "Oklahoma shall allow a quantity of water equal to 40 percent of the total runoff originating below" the three major reservoirs located or authorized in Oklahoma, i.e. Pine Creek Lake on the Little River, Lukfata Reservoir (proposed) on the Glover River, and Broken Bow Lake on the Mountain Fork River. In other words, the 40-percent total runoff that Oklahoma must allow to flow down the Little River into Arkansas is calculated on the runoff produced in the watersheds downstream from the three major reservoir sites. No water in Pine Creek or Broken Bow Lakes must be released to fulfill Oklahoma's obligation under the Red River Compact. The average amount of water that flows out of the Little River and Mountain Fork is more than 2.4 million acre-feet/year. A substantial amount of that water originates upstream from Pine Creek and Broken Bow Lakes and the proposed Lukfata Reservoir site; therefore, a substantial amount of the water would not be subject to the 40-percent flow requirement into Arkansas. The OWRB has calculated 40-percent lower basin runoff amount to be approximately 242,072 acre-feet/year.

Waters released from Broken Bow Lake for hydropower production (estimated to average more than 700,000 acre-feet/year) and new releases from Broken Bow Lake for the trout fishery on the Mountain Fork River downstream from Broken Bow Lake (estimated at over 137,000 acre-feet/year) are waters that originate above the Broken Bow dam site, and therefore are not included in the runoff originating below Broken Bow that must be allowed to flow into Arkansas. Based on an annual flow calculation, the NTWA proposal to divert up to 200,000 acre-feet from the Little River downstream from the confluence of the Mountain Fork would not violate the Red River Compact apportionment provision in Section 5.03(b).

In considering instantaneous flow, Section 5.03(c) indicates that accounting will be on an annual basis "unless otherwise deemed necessary to the States of Arkansas and Oklahoma." In other words, the *annual* flow amount originating downstream from the three named reservoir sites in Oklahoma is to be used to determine compliance with Oklahoma's obligation to allow 40 percent of the runoff to flow into Arkansas. However, Arkansas and Oklahoma could agree that a monthly, weekly, daily or instantaneous flow must be used to determine Compact compliance. To address the potential for using a more frequent flow accounting method, the draft contract with NTWA provides that the diversion would have to comply with the Red River Compact. Additionally, the appropriation recognized for STICC could contain a condition that requires any Little River diversion to be in compliance with the Red River Compact. As indicated previously, the computer simulations used to determine water availability on the Little River included a 50-cfs base flow protection at the potential point of diversion, which is several miles upstream from the Arkansas-Oklahoma border. Under the computer simulation, and considering the additional water from the intervening watershed, more than 50 cfs would be flowing into Arkansas. If the States of Arkansas and Oklahoma agreed, a calculation of the historical runoff originating downstream from the three dam sites would be required to determine if a more frequent flow accounting method is needed.

Environmental Studies Required Before Final Quantification

As part of the NTWA proposal and draft water sale contract, the NTWA would agree that all required environmental studies must be completed and all necessary permits and licenses received prior to construction of any infrastructure. The proposed contract would allow for a three-year study and permit/license period within which all environmental studies and necessary permits are obtained. If any required permit could not be obtained in that period, further studies could be initiated or the contract could be terminated. The total quantity of water made available would be subject to confirmation and adjustment based on results of the environmental studies (and perhaps permit conditions). Subjects that would be analyzed in the three-year environmental study period include:

- Determination of environmental impacts and any necessary mitigation for reallocation of Hugo Lake storage. As indicated above, releases from the water quality pool at Hugo Lake and impacts on the Kiamichi River downstream from Hugo and on the Red River would be part of this environmental analysis.
- Determination of flow needs in the Kiamichi River upstream from Hugo Lake for the protection of the endangered Rock Pocketbook mussel (i.e., confirm whether the 50 cfs flow is appropriate).
- Determination of flow needs in the Little River downstream from its confluence with the Mountain Fork.
- Analysis of potential impacts of diversion points after final plans and designs for those locations are completed.

No Lukfata Reservoir on the Glover River

The NTWA proposal does not require any new reservoir storage construction within any of the three major basins from which water would be diverted. There has been particular public concern regarding the Glover River, one of the last major rivers in Oklahoma where a reservoir has not been built. The Glover, a tributary of the Little River, is located a few miles east of Pine Creek Lake. Pursuant to federal law approved in 1958, Congress authorized the construction of Lukfata Reservoir on the Glover River. Three potential sites for a dam have been studied by the Corps of Engineers, although no funding has been appropriated to the Corps for property acquisition or construction. In other words, Lukfata is authorized but not funded. Pursuant to federal law, a local sponsor must agree to repay water supply storage costs of the reservoir before the Corps of Engineers could approach Congress for funding. There are no known local sponsors (municipalities, industries, etc.) who have expressed a need for any water supply from Lukfata, particularly in view of available water and storage in nearby Pine Creek and Broken Bow Lakes. In any event, the NTWA proposal does not trigger any use of water supply storage at existing reservoirs, let alone storage at any future reservoir on the Glover River.

No New Reservoir on the Little River

There have also been concerns expressed about building a reservoir on the Little River downstream from the confluence of the Mountain Fork. Some local groups opposing a water sale to Texas reported that a reservoir inundating up to 27 sections of land was proposed for the Texas water sale. Contrary to such reports, no such reservoir has been proposed. The NTWA proposal does contemplate that a diversion point could be placed at that location to obtain a fraction of the combined flows of the Little, Glover (which flows into the Little River) and Mountain Fork Rivers (which contains substantial releases from the existing hydropower plant at Broken Bow Lake and substantial releases for the trout fishery downstream from Broken Bow Lake). Although the NTWA proposal does contemplate a low water dam or off-stream diversion structure to divert the water, such a structure would be designed so that no lands outside the stream bank of the Little River would be inundated and no additional flooding during high water periods would result.

There was some initial discussion by an area developer expressing interest in recreational use of water in southeast Oklahoma, that a dam could be built on the Little River to back-up water within the channel of the Little River (not outside the banks) for some distance upstream to the actual withdrawal point, thereby saving pipeline costs. This concept, not adopted by NTWA, would also require significant feasibility and environmental study.

No Tuskahoma Reservoir on the Kiamichi River

In addition to Hugo Lake (completed in 1974) and Sardis Lake (completed in 1983), a third reservoir was authorized by Congress on the upper Kiamichi River Basin. Tuskahoma Reservoir is the third of three reservoirs proposed by the Corps of Engineers to control flooding on the Red River. Similar to proposed Lukfata Reservoir, on the Glover River, no local sponsors have shown sufficient interest or need in water supply from an additional reservoir on the Kiamichi River. In addition, local U.S. Fish and Wildlife Service staff have indicated that construction of Tuskahoma would likely cause losses of endangered mussels. The NTWA proposal does not contemplate the need for use of any water supply storage in Oklahoma. Therefore, no plans have been made to pursue funding of Tuskahoma Reservoir.

Ownership Of Infrastructure In Oklahoma

The NTWA proposal, as more clearly delineated in the draft contract, clarifies that no Texas entity will own property in Oklahoma. The HCR 1066 Working Group and Oklahoma negotiating team concur that ownership of infrastructure by a Texas water sale entity could threaten Oklahoma's control of water going to Texas. The draft contract specifies that the STICC (compact commission created by the State-Tribal Water Compact) would own all property and infrastructure, including all pipelines, easements, pumps and pumping stations, and all water rights associated with the water sale. The NTWA would have only a contractual right to have water delivered at the point of delivery within the State of Texas, just south of the Red River.

Eminent Domain

Similar to the issue involving the ownership of property and infrastructure in Oklahoma, Oklahoma officials agree that no Texas entity should be given eminent domain authority within Oklahoma. The draft contract specifies that only the STICC will have eminent domain authority in Oklahoma, and only pursuant to State law. Current State law (Title 82, Oklahoma Statutes, Section 105.3), existing in some form since before statehood in 1907, provides the right of eminent domain for the purpose of putting water to beneficial use. To make water available as contemplated in the NTWA proposal, the STICC would need to exercise eminent domain authority only to acquire easements for pipelines, or perhaps limited ownership interests, in small tracts of land at the two points of diversion. No reservoir sites are contemplated and no lands would be condemned to build new reservoirs, as explained above.

Fiscal—Financing of Infrastructure

According to the NTWA proposal, and as more clearly specified in the draft contract, the STICC would acquire all necessary easements, pipelines, pumps, etc., to make water available to the NTWA according to the terms of the contract. Additionally, significant costs would be associated with environmental studies and acquisition of permits and other authorizations needed for the use of water. The draft contract specifies that the NTWA will pay all such infrastructure and study costs to the STICC and the Commission would control all related studies. Infrastructure costs, STICC overhead costs, etc., are completely separate from and in addition to the "commodity charge" that would be assessed and paid by the NTWA and any "temporary water payments" that may be made (for short-term amounts of water that may be made available, such as in flood times, or temporary, short-term water that might be made available – for example, future supply for the City of Hugo or Western Farmers Electric Cooperative, for a period of years until needed in Oklahoma).

The draft State-Tribal Water Compact sets forth the duties and authorities of the STICC, one of which is to issue bonds to pay for infrastructure improvements needed to make water available for an out-of-state water sale. Part of the payments from the NTWA to STICC would be dedicated to the repayment of the bonds issued by STICC. There is some language in the draft contract with NTWA included for the benefit of bond counsel and bond rating agencies so that the STICC bonds could obtain a low rating (and attendant interest rates) by relying on the significant financial resources and backing of the NTWA members.

Commodity Charges

In initial discussions with the NTWA representatives, State and Tribal officials made it clear that Oklahoma holds significant value in the use of its water resources. Valuation of the water to be made available to the NTWA became a subject of extensive discussion and negotiation. Unlike other natural resources, such as oil and gas (nonrenewable resources sold by Oklahomans to

Texans) that have readily identifiable markets to determine pricing, water (a renewable resource) has no international, national or regional markets through which to establish pricing.

In 1992, the OWRB contracted with Steven Shupe and Associates to provide input into the valuation of water resources in water marketing arrangements. Mr. Shupe, who had significant experience in the western United States in valuing water supplies for water contracts, analyzed several water sales that were active at that time. He recommended that a starting place for valuing water was the buyer's "least cost alternative" approach. In other words, it was Mr. Shupe's position that a buyer, including public water suppliers, must consider alternatives to obtaining water supply, whether those alternatives include building a reservoir of their own, purchasing supplies from other entities that have surplus supplies, or treating abundant but less desirable quality water through desalinization or reverse osmosis. It is clear that most potential purchasers of water, particularly public entities, must analyze potential sources and choose the least costly alternative that meets the needs of the purchaser. Another possible method to value water made available for sale include consideration of the benefit to the purchaser. Because water is a fundamental element of life itself, such valuation is difficult at best. Although linking the value of water with projected gross revenues from the purchaser's service area, both with and without additional water supplies made available, could be useful, this method of valuation might be acceptable only if the purchaser has no alternative water source to consider.

The draft contract provides that the NTWA would provide separate payments designated as a "commodity charge." It is this charge that includes the "value of the water" to be made available to the NTWA by Oklahoma.

In the NTWA contract negotiations, it was agreed that the least cost-alternative approach to pricing the water would be appropriate. As described in the Regional Water Plan for Texas, a proposed Marvin Nichols Reservoir is identified as a future water supply alternative for the Region C area (which includes the areas served by the NTWA members). Marvin Nichols Reservoir would be located on the Sulphur River, in east Texas south of Idabel, Oklahoma. In contract negotiations with the NTWA, a cost analysis was made of the Marvin Nichols proposal. Using information from Texas' Regional Water Plan and other information provided by the NTWA, it was estimated that the total cost of Marvin Nichols Reservoir would be approximately $1.7 billion (amortized over 30 to 40 years through bonds that would be issued for payment of construction costs).

Attempting to reduce, in theory, the value of Oklahoma's water, NTWA representatives pointed out that Marvin Nichols Reservoir, as proposed, would yield approximately 619,100 acre-feet/year, much more than the 320,000 acre-feet/year to be made available from Oklahoma. They also emphasized that after the 30- or 40-year pay-out period, the storage would be owned in perpetuity by the NTWA, whereas the proposal involving use of water from Oklahoma was only for a limited term of 100 years. NTWA representatives further argued that transmission costs from the Marvin Nichols site would be less than the Oklahoma transmission costs, so the Oklahoma water value should be reduced accordingly. Information relating to the NTWA's future alternatives indicated that the Oklahoma supply of 320,000 acre-feet would not provide all the future supply needs of the NTWA area, and that Marvin Nichols Reservoir or some other alternative, such as Toledo Bend Reservoir in southeast Texas, would have to be pursued at some point, requiring significant pipeline and attendant costs.

A financial consultant hired by the Choctaw and Chickasaw Nations (Ed Cebron of the FCS Group, Inc. of Seattle, Washington) considered the positions of the Oklahoma interests, as well arguments of the NTWA interests, and calculated the reasonable value of the water using the least-cost alternative approach. Mr. Cebron calculated annual payments to be made over the 100-year term of the contract, including such factors as interest costs that would be avoided by

delaying obligations for other long-term future supplies by the NTWA, escalation based on long-term inflation, up-front payment amount, and increase in base commodity charges as additional amounts of water are made available in the development phases of the project.

According to Mr. Cebron, the "present value" of the annual payments to be made over the 100-year term of the contract equaled $339 million. Under the amortization schedule for "commodity charge" annual payments, $5.1 billion could be realized from the reasonable valuation of the water. According to Mr. Cebron's amortization, annual payments of approximately $9.5 million would be made for the first 10 years, and then increase to more than $124 million during the last seven years of the contract. An up-front payment of $35.4 million was also included in the amortization schedule. Officials from Oklahoma and representatives of the Choctaw and Chickasaw Nations agreed that the valuation calculated by Mr. Cebron was reasonable and should be required for the NTWA water sale. However, it was understood that the structure of the annual payments (i.e., how payments are amortized) would impact the total revenues received over the 100-year period.

For comparison, the total amount of $339 million (present value) for 320,000 acre-feet of water is equivalent to approximately $1,059 per acre-foot. A water sale reported in the December 2001 Water Strategist involving San Antonio and the Edwards Aquifer included a purchase price of $700 per acre-foot for 10,400 acre-feet. The San Antonio transaction was a permanent purchase, not a 100-year term lease of water as being contemplated for the NTWA.

Representatives of the NTWA made their own calculation of the waters' value and provided their own amortization of payments based on the NTWA valuation. On December 31, 2001, NTWA officials presented their calculations to officials of the State and Tribal Nations. The "present value" of the NTWA calculations was $174.3 million (about $544 per acre-foot for 320,000 acre-feet), with total of payments of $1.4 billion. NTWA representatives claimed that they had to reduce valuation in considering transmission cost differences and other factors that would be involved in the Marvin Nichols alternative.

On January 11, 2002, after further informal discussions with the NTWA officials, Howard Barnett (on behalf of Governor Keating), Chief Gregory Pyle, and Governor Bill Anoatubby jointly announced that water sale negotiations with the NTWA had been terminated in view of the significant discrepancy in the perceived value of the water.

Temporary Use Waters & Separate Charges

During negotiations, NTWA representatives indicated that the hydrologic and future needs analyses in Oklahoma showed that during short-term or temporary periods there would be additional surplus or temporary waters in reservoirs or in the Kiamichi/Little Rivers, separate and apart from the 320,000 acre-feet/year dependable amount. To utilize such additional waters, the NTWA would have to oversize the pipelines and pumps, but would be willing to do so if an agreement could be reached to quantify those amounts and assign value to the temporary use waters.

An example of such additional surplus or temporary water could include water already appropriated by Oklahoma entities in reservoir storage. For example, Hugo Municipal Authority holds about 32,000 acre-feet of water rights for the City of Hugo's use through a water storage contract with the Corps of Engineers. The storage contract is accumulating interest for the storage that is not being used by Hugo and will result in balloon payment that Hugo will be hard-pressed to make. Hugo could agree to sell a percentage of the water it holds in storage (maybe 25,000 acre-feet/year) for a temporary period (perhaps 20 to 30 years) in exchange for the payments of Hugo's entire Corps storage costs. After the period, Hugo would posses the storage in perpetuity, without further costs, and would have an abundant supply of water

reverted to them for future growth. One of the cornerstone principles adopted by the HCR 1066 Working Group and included in the Kiamichi River Basin Water Resources Development Plan report specified that the repayment obligation of municipalities for water supply storage should be addressed. A temporary water sale would be consistent with this cornerstone principle.

Similarly, Western Farmers Electric Cooperative has water rights and storage from Hugo Lake for which there is currently no future demand. Like Hugo, Western Farmers could agree to a temporary sale of water supply and have its storage costs paid off, and then a return of all its water rights in a reasonable time to meet Western Farmers' future needs.

Regarding the anticipated short-term availability of the "temporary" water, initial discussions with the NTWA indicate that they are willing to pay approximately one-half the value of the long-term water for any temporary water.

Tribal Use of Net Revenues

The use of the "commodity charge" revenues that would be paid by NTWA to Oklahoma interests (specifically, to STICC pursuant to the State-Tribal Water Compact) was not part of the discussions or negotiations with the NTWA representatives. However, NTWA representatives were agreeable and the draft water sale contract provides that STICC would work with the NTWA on sizing pipelines and pumps and in locating pipelines (such as along the Highway 70 economic development corridor) so that Oklahoma interests could take advantage of the water development and transmission for the NTWA water sale. Under the State/Tribal Water Compact, gross revenues from an out-of-state water sale would be utilized to pay the water supply cost of Sardis Lake, in addition to other costs necessary to make the water available for out-of-state sale. The remaining (net) revenues would be divided 50 percent to the State and 50 percent to the Choctaw and Chickasaw Nations.

The State-Tribal Water Compact, in Article 5.3(c), states that the Choctaws and Chickasaws may use their portion of net revenues from an out-of-state water sale only for economic development, education, tribal government programs, social service programs, road programs, tribal infrastructure development, health care, senior citizens programs, youth programs, housing programs, acquisition and management of real property, culturally relevant programs, and similar programs. Informal discussions with tribal representatives indicate that the tribal governments will welcome opportunities to coordinate with the State on use of the funds for priority projects, such as water and wastewater improvements.

State Use of Net Revenues

Like the Tribal use of their portion of the commodity charge, the State's use of its portion of the annual payment was not discussed or negotiated with the NTWA. However, two of the cornerstone principles included in HCR 1066 and the Kiamichi River Basin Water Resources Development Plan specified that financing opportunities for water/wastewater infrastructure and related economic development projects within the basin shall be optimized, and obligations of the State and municipal trusts to the United States for repayment of construction and maintenance costs of the water supply storage in the basin area shall be addressed.

The following scenarios, which are consistent with the cornerstone principles for development of water from the Kiamichi River Basin and southeast Oklahoma and are generally reflected in the draft State/Tribal Water Compact, might be considered for use of the State's portion of revenues received from a NTWA water sale:

- Create a State public trust with membership from a variety of interests appointed by the Governor with advice and consent of the Senate.

- The State public trust would adopt objective criteria that would be used for prioritization and in consideration of applications for funding of projects.
- The State public trust could be given authority to make loans and grants to eligible entities for eligible projects; loans could be low-interest or no interest.
- The State public trust could be given authority to leverage water sale revenues through issuance of bonds.
- In the enabling legislation, describe the kinds of projects eligible for funding. Preference should be given to water and wastewater projects, then other economic development projects, with initial priority to such projects that are located in or would serve persons within the area of origin of the water being provided for the out-of-state water sale, with the remainder of the funds to be used in the 22-county area subject of the State/Tribal Water Compact.
- The State public trust could be given authority to work with the OWRB to utilize the existing Statewide Water Resources Development Revolving Fund and water and wastewater infrastructure financing authority of the OWRB, allowing efficiency in using experienced OWRB staff for loan and grant financing.
- The State public trust could be given authority to work with the Oklahoma Department of Commerce for coordinating and assessing other economic development projects and funding opportunities.
- Some priority projects, such as additional funding for the Sardis Lake Water Authority water treatment and distribution system around Sardis Lake and the water storage cost owed by the Hugo Municipal Authority, could be specifically named for receipt of funding.
- Other special funding provisions could be included, such as the transfer of a severance tax of gross production tax equivalent to the State General Fund to address arguments that the interstate sale of water should be similar to the sale of oil and gas. Another special funding provision could be an in lieu of ad valorem tax amount transfer to affected counties for land taken off the county tax rolls for Sardis Lake, Hugo Lake, Pine Creek Lake, and Broken Bow Lake.

Total Potential Benefit to Southeast Oklahoma and State

Obviously, there appears to be substantial benefit possible from an out-of-state water sale involving the North Texas Water Agency. If negotiations are renewed and the NTWA is willing to compensate Oklahoma according to the valuation deemed reasonable by Governor Keating's office and officials with the Choctaw and Chickasaw Nations, approximately $5 billion could be realized for use in Oklahoma within the next 100 years. Although the Tribal portion of the net revenues would not be limited for use within Oklahoma under the draft State/Tribal Water Compact, it is reasonable to assume that, because the vast majority of Choctaw and Chickasaw Nation members reside in southeast Oklahoma and the governments of the two Tribes are located in the region, a significant portion of the water sale revenues would be utilized in southeast Oklahoma.

Another benefit from a water sale contract and revenues is the payment of the costs of water supply in Sardis Lake. In previous studies involving Sardis Lake uses, an estimate was made that the direct and indirect benefits of the Sardis Lake fishery use (based on estimated visitor counts and daily expenditures in the area) was approximately $4 million per year. The protections available in the NTWA proposal (which does not utilize any Sardis Lake storage) would allow the fishery to be the priority use of the reservoir, thereby maintaining the $4 million per year local area economic benefit. The payment of Sardis Lake costs would also relieve the

State of the burden it faces in making the annual payments, or deferring such payments with interest accumulating, and facing lawsuits relating to the annual payments in addition to the two lawsuits now pending. That blemish on the State's credit could eventually cause higher interest rates on State bonds.

In addition, net revenues from a NTWA water sale could be leveraged through bond issues, with use of bond proceeds for loans and grants for local area projects. Utilizing just $10 million of an up-front payment from a water sale for security and collateral and pledging a portion of the annual water sale revenues for payment on the bonds, it is reasonable to assume that $200-300 million could be made available for the immediate water, wastewater and economic development project needs in southeast Oklahoma.

Oklahoma City Water Utilities Trust Proposal

Primary Options

As discussed above, the Oklahoma City Water Utilities Trust (OCWUT) is interested in acquiring water rights to divert water from the Kiamichi River Basin. The distance from the Kiamichi River to McGee Creek Lake is approximately 18 miles, thereby making the Kiamichi River a logical choice for long-term future supply by central Oklahoma using current infrastructure of the OCWUT. One option for development would include the use of Sardis Lake for a water supply and an assignment or other transfer of the State's 1974 water supply storage contract rights to Sardis Lake, including the contractual requirement to make annual payments to the Corps of Engineers. The other option would have the OCWUT utilize the flows of the Kiamichi River only, without payment being made for Sardis Lake storage.

Hybrid Option

Further discussions with Jim Couch, City Manager for Oklahoma City and member of the OCWUT, and Marsha Slaughter, Director of Water and Wastewater for Oklahoma City, indicated that the OCWUT may be interested in a hybrid or combination of the two options described in the OCWUT response to the Request for Qualifications. In essence, the hybrid or combination option would have the OCWUT enter into a sub-contract with the OWRB allowing the OCWUT to utilize storage in Sardis Lake under very limited circumstances, with most of the water for the OCWUT supplied through direct diversions from the Kiamichi River.

Pursuant to the hybrid option, the first source of supply for the OCWUT would be flows in the Kiamichi River at a location near Moyers (south of Antlers) or some other point of diversion to avoid unacceptable impacts to the endangered Rock Pocketbook mussel. Hydrologic analysis, using a minimum flow factor of 50 cfs as a reasonable estimate needed for protection of the mussel, indicates that approximately 50,000 acre-feet/year (~45 mgd) is dependably available for an OCWUT diversion.

After the direct diversion use from the Kiamichi River, the hybrid option would provide that the next available supply would be from releases used to maintain the lake level management plan for Sardis Lake. In 1992, the Oklahoma Department of Wildlife Conservation developed a lake level management plan to optimize the fishery use of Sardis Lake. That plan called for releases to be made from September through February each year to lower the level of Sardis by four feet to allow the planting of millet along the shoreline. The OCWUT could divert such released water as it flows down the Kiamichi River to the OCWUT point of diversion. The hybrid plan discussed with OCWUT officials indicated that additional water could be released from Sardis Lake, but only in the event of an emergency drought situation declared by the Governor.

This would be a more limited condition for use of Sardis Lake storage than set forth in OCWUT's first option, detailed below.

Amount Requested

OCWUT Option 1

Option 1 contemplates usage of the full available yield at Sardis Lake of approximately 149,762 acre-feet, equivalent to 133 million gallons per day, with the commitment to an adopted lake level management plan for 20 to 40 years. After that time, OCWUT would manage inter-basin transfers in accordance with its ownership rights in McGee Creek, Atoka Lake, and Lake Stanley Draper, and release policies (including recognition of the ODWC Sardis Lake level management plan) to the extent they will not endanger or jeopardize municipal/industrial water supply or place undue burdens on other lake level management and balancing policies elsewhere in its system. Based on use projections for central Oklahoma, full use of Sardis Lake water would not occur for 50 to 70 years.

OCWUT Option 2

Option 2 would utilize direct diversions from the Kiamichi River (near Moyers) at a maximum 200 cubic feet per second (without impacting the Sardis Lake or Hugo Lake yields or lake level management plans and protecting the Kiamichi River with a prescribed base flow). According to a Corps of Engineers hydrologic investigation and analysis by OCWUT, this would dependably yield approximately 50,000 acre-feet/year if a West Elm Creek Reservoir terminal storage site is constructed.

Protections for Oklahoma

Local and Central Oklahoma Future Needs

The OCWUT is in a position to assist local areas around Sardis Lake with plans for drinking water treatment and distribution systems. Furthermore, the OCWUT has infrastructure in place to utilize waters from the Kiamichi River Basin in areas along the pipeline that connects McGee Creek Lake, Atoka Lake, and Lake Stanley Draper. Finally, the OCWUT has infrastructure and financial capabilities to partner with central Oklahoma communities (such as City of Norman, City of Edmond, Canadian County cities, etc.) to make Kiamichi River Basin water available as the long-term future source for central Oklahoma.

Present and Future Needs of Local Areas—Water Supply from Existing Reservoirs

OCWUT's Option 1 includes use of only Sardis Lake under limited circumstances. Storage in other large reservoirs in southeast Oklahoma, including Hugo, Pine Creek, and Broken Bow, would not be impacted by this plan, or OCWUT option 2. Therefore, all water supply storage in those reservoirs would be available for local use and all existing uses would be protected.

Present and Future Needs of Oklahomans—Other Water Available from River Basins

As indicated in the discussion of the NTWA proposal, the average annual flow from the six major river basins in southeast Oklahoma is more than six million acre-feet. The OCWUT options would entail a maximum use of less than 150,000 acre-feet/year under option 1 (remaining dependable supply from Sardis Lake for long-term future needs for local use and central Oklahoma), which is just 2.5 percent of total average flows.

Lake Level Management Plans

OCWUT's Option 1 (use of Sardis Lake storage with limitations) would include the lake level management plan to protect the fishery for at least 20 to 40 years. After that time, when OCWUT's municipal and industrial needs develop, Option 1 would recognize the lake level management plan as a target in a release schedule. In most years, the lake level management plan could be implemented, and only in significant drought years would there be municipal and industrial use of Sardis Lake water supply storage. Option 2 would not impact a lake level management plan for Sardis Lake.

Neither option would impact Hugo Lake storage or any lake level management plan implemented for Hugo Lake.

Integrity of the Kiamichi River

OCWUT's Option 2 (direct diversions from the Kiamichi River) take into account the need for a base flow of 10 cfs (equivalent to 7,240 acre-feet/year) for protection of the river. As indicated in the discussion of the NTWA proposal, which utilized 50 cfs as the base flow for protection of the Kiamichi River (as well as the Little River), the U.S. Fish and Wildlife Service has not conducted studies to determine the flow and temperature needs for the endangered mussel habitat. Therefore, at this time, it is unknown what base flow amount will be required to fully protect the Kiamichi River and further environmental studies will be required.

Environmental Studies Required Before Final Quantification

As indicated above, an environmental study will be necessary to quantify the required minimum flow in the Kiamichi River. That amount will then be used to finalize the amount that could be withdrawn by the OCWUT under the Option 2 direct diversion scenario.

In connection with the protection of the endangered rock pocketbook mussel, the U.S. Fish and Wildlife Service indicated in a 1999 letter that moving the OCWUT's diversion point to a location downstream from Highway 3 at the headwaters of Hugo Lake would likely address concerns related to the endangered mussel.

No New Reservoirs

The OCWUT options for development of waters of the Kiamichi River do not entail the construction of any new reservoirs. Therefore, no environmental impact studies involving new reservoirs would be triggered.

Ownership of Infrastructure and Storage

Under Option 1 or 2, the OCWUT would have to construct pumps and pipelines to divert water from the Kiamichi River, either at Moyers or at a location acceptable to protect the endangered mussel. A pipeline 18 or more miles long from the Kiamichi River diversion site to McGee Creek Lake would be constructed. The OCWUT would own all infrastructure.

Regarding the Sardis Lake water supply storage, Option 1 indicates that the OCWUT is willing to "purchase" the Sardis storage from the State. Such a "purchase" of storage could be implemented by an assignment from the State to the OCWUT. However, the 1974 contract contains a provision that the Corps of Engineers must approve such an assignment, which could result in updated water supply storage costs.

Eminent Domain

In obtaining a permit to use water from the Kiamichi River basin, the OCWUT could utilize existing State law regarding the appropriation and use of water (Title 82 Oklahoma Statutes,

Section 105.3) for the power of eminent domain necessary for the storage and conveyance of water. This authority could be utilized to obtain easements for pipelines, pump stations, and related infrastructure.

Payment by OCWUT

Under Option 1 (use of Sardis Lake storage), the OCWUT would agree to assume the obligations to repay the federal government under the 1974 Sardis contract.

When Sardis Lake was completed in 1983, the State (through the Water Board) began making annual payments, but has since stopped. The total water supply costs for Sardis Lake, as determined by the Corps, are as follows:

Storage	=	$37,766,310
Conduit	=	121,213
Water intake structure	=	481,045 (including cost disputed by State)
Total	=	$38,368,568

Total invoiced by the Corps of Engineers excluding late payment interest (1983-2001)	=	$13,233,911.36
Total paid by Oklahoma to the Corps of Engineers	=	$ 4,415,640.49
Difference (arrearage claimed by Corps, less claimed interest)	=	$ 8,818,270.87

The annual payment obligations include annual operation and maintenance costs that may range from under $200,000 to more than $400,000 per year, as well as any major rehabilitation work that may be necessary for Sardis Lake. The OCWUT would also agree to assume the arrearage (~$8.8 million) now claimed by the Corps of Engineers for annual payments, which have not been paid by the State. The OCWUT would also pay the late payment interest claimed by the Corps on the annual payments, which have not been paid by the State. Finally, the OCWUT is agreeable to work with local interests in operating and maintaining local water systems.

Option 1 does not include a reimbursement of the $4,415,460 paid by the State to the federal government, or any portion of the "principle" costs paid by the State as part of the payments made to the federal government.

Under Option 2 (direct diversions from Kiamichi River flows only), the OCWUT would not pay the State any proceeds for use of the water. No citizen or community of the State of Oklahoma pays for use of water from streams or reservoirs in Oklahoma. The only costs associated with obtaining water rights in Oklahoma include minimal application fees for appropriation permits and the costs of publication of notice and any hearings held if protests are received. The State does not charge for use of public water that is subject to appropriation. Municipal use, such as that proposed by the OCWUT, requires expenditures for storage (either the costs of building its own reservoir or obtaining storage rights from the federal government) and expenditures for pumps, pipelines and treatment and distribution systems, as well as ongoing operation and maintenance costs of the infrastructure.

Total Potential Benefit to Southeast Oklahoma and State

OCWUT's Option 1 would relieve the State of the obligations set forth in the 1974 contract for the repayment of Sardis Lake. The outstanding balance of the total storage cost for water supply at Sardis Lake is more than $38 million, with on ongoing operation and maintenance cost of $200,000-400,000 per year.

The Sardis Lake area could benefit by utilizing the OCWUT offer to assist with the operation and maintenance of any local water treatment and distribution systems (such as that to be constructed by the Sardis Lake Water Authority). To the extent that the OCWUT pays the costs of Sardis Lake water supply (if Option 1 is chosen for implementation), revenues from a sale of water to the NTWA will not be needed for the Sardis Lake payments and can be applied to water/wastewater infrastructure and economic development needs in southeast Oklahoma.

Finally, a significant benefit to Oklahoma can be realized by addressing the long-term future water supply for central Oklahoma. As the central Oklahoma area grows, its demand for water will increase. If other central Oklahoma communities can enter into partnerships and agreements with the OCWUT for the use of water from the Kiamichi River Basin, the assured source of supply should allow the central Oklahoma communities to continue growth and economic development. This prosperity can also result in significant beneficial impacts for other areas of Oklahoma, including the southeast.

Summary of Latest Contract Proposals
Southeast Oklahoma Water Resources Development Plan

Oklahoma City Water Utilities Trust	Amount of Water Requested	Year Available	Diversion Point(s)	Monetary Benefit/Compensation to Oklahoma
Option 1	149,762 ac-ft/yr (Sardis Lake yield) in accordance with lake level plan	2020-40 (initial use) 2050-70 (full use)	Kiamichi River (north of Antlers at Moyers) or Kiamichi River (just below Highway 3 bridge) or Hugo Lake (southern end)	~$38 million • assumption of Sardis Contract obligation
Option 2	55,000 ac-ft/yr (available Kiamichi River flows)			no payment (public water)

North Texas Water Agency	Amount of Water Requested	Year Available	Diversion Point(s)	Monetary Benefit/Compensation to Oklahoma
Phase 1	120,000 ac-ft/yr	2012	Kiamichi River (downstream of Hugo Lake)	$339 million • up-front payment = $35.4 million • escalating payments = $9.5-$124 million/year • amortized over 100 years = $5.1 billion
Phase 2	160,000 ac-ft/yr (+40,000 ac-ft/yr)	2017	Kiamichi River (downstream of Hugo Lake) and Little River (upstream from confluence of Mountain Fork River)	
Phase 3	320,000 ac-ft/yr (+200,000 ac-ft/yr)	2022	Little River (downstream from confluence of Mountain Fork River)	

WATER QUANTITY CONVERSION CHART

To convert from one water quantity measurement to another, multiply the existing measurement number by the number contained in the appropriate column at right.	**CFS**	**GPM**	**MGD**	**AC-FT/year**	**AC-FT/DAY**
CFS (cubic feet/second)	---	450	.646	724	1.98
GPM (gallons per minute)	.00222	---	.00144	1.61	.00442
MGD (millions gallons/day)	1.55	695	---	1120	3.07
AC-FT/year (acre-feet/year)	.0014	0.62	.00089	---	.00274
AC-FT/DAY (acre-feet/day)	.504	226	.326	365	---

For example, to convert 140 million gallons per day (mgd) to cubic feet per second (cfs), you would multiply 140 times 1.55 to come up with the desired conversion, 217 cfs.

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
FEB 19 2013
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No. 11-889

In the Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,

Petitioner,

v.

RUDOLF JOHN HERRMANN ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTIONS PRESENTED

1. Whether the Red River Compact, which allocates to each of the signatory States an "equal share" of the water in a specified subbasin, preempts discriminatory Oklahoma laws that prevent certain signatory States from obtaining their equal share of that water.

2. Whether Congress's approval of Compact language providing that the Compact shall not "be deemed * * * to interfere" with each State's "appropriation, use, and control of water * * * not inconsistent with its obligations under this Compact" manifests an unmistakably clear congressional consent to discriminatory state laws.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court of appeals were appellant Tarrant Regional Water District, a Texas state agency; and appellees Ford Drummond, Ed Fite, Rudolf John Herrmann, Jack W. Keely, Kenneth K. Knowles, Linda Lambert, Jess Mark Nichols, Richard Sevenoaks, and Joseph E. Taron in their official capacities as members of the Oklahoma Water Resources Board and the Oklahoma Water Conservation Storage Commission.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-52a) is reported at 656 F.3d 1222. The district court's orders granting respondents' motion for summary judgment (Pet. App. 53a-74a) and motion to dismiss (Pet. App. 75a-83a) are available, respectively, at 2010 WL 2817220 and 2009 WL 3922803.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2011. A timely petition for rehearing was denied on October 21, 2011. Pet. App. 85a. This Court granted a timely petition for certiorari on January 4, 2013. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Compact Clause of Article I, Section 10 of the U.S. Constitution provides, in relevant part: "No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State * * *."

The Supremacy Clause of Article VI of the U.S. Constitution provides, in relevant part: "This Constitution, and the Laws of the United States * * * shall be the supreme Law of the Land * * *, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Commerce Clause of Article I, Section 8 of the U.S. Constitution provides, in relevant part: "The Congress shall have power * * * To regulate com-

merce with foreign nations, and among the several States, and with the Indian tribes."

The Red River Compact (Pub. L. No. 96-564, 94 Stat. 3305 (1980)), is reproduced at 1JA7-51. Relevant portions of the Oklahoma Statutes Annotated are reproduced at 1JA87-97.

STATEMENT

The Red River Compact expressly allocates most of the water it apportions to the States in which that water is located. But in one defined geographic region, the Compact allocates "equal rights to the use" of specified water to *each* of the Compact's four signatory States—Arkansas, Louisiana, Oklahoma, and Texas—without reference to state lines; in that region, "no state is entitled to more than 25 percent of the water." That is so even though more than half of the water within the region (including the entire bed of the Red River itself) lies in Oklahoma, while only a small fraction is located in Texas and *none* is located in Louisiana.

Oklahoma, however, has enacted a panoply of expressly discriminatory state laws that, in practical effect, prevent Texas from obtaining the "equal rights to the use" of the specified water that it is entitled to under the Compact. Petitioner Tarrant Regional Water District (Tarrant) accordingly filed suit to obtain this equal share of water for Texas residents, arguing that Oklahoma's water embargo is both preempted by the Red River Compact and unconstitutional under the dormant Commerce Clause. Tarrant seeks declaratory and injunctive relief to prevent Oklahoma from enforcing its discriminatory water laws. But the Tenth Circuit rejected the challenge, reading the Compact to entitle each signatory

State to use or access only 25% of the equally apportioned water *in its state*—a bargain that, on the face of it, makes no sense at all. At the same time, the court of appeals believed that boilerplate language in the Compact and ambiguous elements of its legislative history express an "unmistakably clear" congressional intent to allow the signatory States to discriminate against interstate commerce.

That decision should not stand. It rewrites an interstate compact that was painstakingly negotiated over the course of more than two decades, disregarding the Compact's express language, coherent structure, and central purpose. It also misapplies the "clear statement" rule governing abrogation of the dormant Commerce Clause that this Court has held vital to prevent Balkanization among the States. This Court should apply the Compact according to its plain terms and set aside the judgment below.

A. The Red River Compact

1. The Red River is a major tributary of the Mississippi River watershed. It drops from the Texas Panhandle, flowing 1,300 miles southeast through Texas, Oklahoma, Arkansas, and Louisiana. S. Rep. No. 84-1030, at 2 (1955) ("1955 S. Rep."). The river's south vegetation line (which does not touch the watercourse) marks the boundary between Oklahoma and Texas east of the Texas Panhandle. Red River Boundary Compact, Pub. L. No. 106-288, 114 Stat. 919 (2000). See also *United States* v. *Texas*, 162 U.S. 1, 26-27 (1896) (construing the Treaty of 1819 between the United States and Spain). The river then flows into Arkansas and from there into Louisiana, emptying into the Atchafalaya and Mississippi Rivers 300 miles north of Head of Passes, Louisiana in the Mississippi Delta. Pet. App. 52a; 1955 S. Rep. 2.

Throughout the first half of the twentieth century, numerous disputes arose among Arkansas, Louisiana, Oklahoma, and Texas over use and allocation of the water of the Red River Basin. See generally M.A. Chapman, *Where East Meets West in Water Law: The Formulation of an Interstate Compact to Address the Diverse Problems of the Red River Basin*, 38 Okla. L. Rev. 1 (1985). These disagreements were "not surprising" in light of the massive interstate span of the basin and the States' "diverse problems." *Red River Compact and Caddo Lake Compact: Hearing on H.R. 7205 and H.R. 7206 before the House Subcomm. on Administrative Law & Governmental Relations of the Comm. on the Judiciary*, 96th Cong., 2d Sess. 3 (1980) ("1980 Hearing"). In response, Congress in 1955 authorized the States "to negotiate and enter into a compact providing for an equitable apportionment among them of the waters of the Red river and its tributaries." Pub. L. No. 84-346, 69 Stat. 654, 654 (1955).

The ensuing negotiations among the four States took more than two decades, finally culminating in an agreement in 1978. 1980 Hearing 3. The Red River Compact was ratified by each State's legislature and was approved by Congress in 1980. See Pub. L. No. 96-564, 94 Stat. 3305 (1980). The disputes between Texas and Oklahoma preceding consummation of the Compact had been especially "long-standing" and required "hard compromises." 1980 Hearing 3.

2. A "principal purpose[]" of the Red River Compact was "to promote interstate comity and remove causes of controversy" by determining a fair and equitable "distribution of the [basin's] interstate water" among the signatory States. S. Rep. No. 96-964, at 1 (1980). The Compact accomplishes that

purpose by dividing the Red River Basin into five "reaches" and those reaches into respective subbasins. 1JA13, 18, 22, 32, 36, (§ 2.12 & Arts. IV-VII). The water in each subbasin is then allocated to one or more of the compacting States. This case concerns water in Reach II, Subbasin 5.[1]

Reach II, which "was the most difficult portion of the Compact to negotiate" (1JA27), is divided into five subbasins: four "upstream" subbasins that all flow into a fifth subbasin containing the main channel and tributaries of the Red River along the eastern half of Texas's border with Oklahoma and Arkansas. 1980 Sen. Rep. 2. See App., *infra* (map).

The Compact expressly apportions the water of each of the four upstream subbasins to the State in which the water is located. Thus, the water of Subbasin 1, which lies "wholly in Oklahoma," is apportioned to that State, which is granted "unrestricted use" of that water. 1JA22 (§ 5.01). Similarly, the water of Subbasins 2 and 4, which lies "wholly in Texas," is apportioned to Texas, which is granted "unrestricted use" of *that* water. 1JA23-24 (§§ 5.02(b), 5.04(b)). Subbasin 3 spans territory in both Oklahoma and Arkansas; the Compact grants "free and unrestricted use of the water of this subbasin" to those two States "within their respective [boundaries]," subject to downstream flow requirements not relevant here. *Ibid.* (§ 5.03(b)).

3. Subbasin 5, which contains the mainstem of the Red River, runs latitudinally through the middle

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[1] Tarrant's lawsuit also sought a permit to appropriate water from Reach I, Subbasin 2. The arguments concerning that subbasin are not before this Court.

of Reach II and spans territory in Arkansas, Oklahoma, and Texas. See App., *infra* (map). The Red River itself is not a suitable source of potable water along this stretch of its course because "salt springs and seeps arising from salt-saturated underlying formations contribute large quantities of briny water" to the River, "rendering the water unusable for most purposes." Chapman, *supra*, at 7. See also 1980 Hearing 6 (the "Red River main stem flows cannot be used for [most] purposes" due to natural "chloride contamination"). Accordingly, the primary water sources within Reach II that "are suitable for domestic and industrial use" (*ibid.*) are the major *freshwater tributaries* to the Red River.

The four upstream subbasins of Reach II are separated from Subbasin 5 by reference not to state lines, but to the "existing, authorized or proposed last downstream major damsites" along the major freshwater tributaries to the Red River, as they flow from the four upstream subbasins into Subbasin 5. 1JA22-24 (§§ 5.01(a), 5.02(a), 5.03(b), 5.04(a)). By keying the boundary of Subbasin 5 to dam sites in this way, the Compact's drafters ensured that any reservoirs located along the freshwater tributaries to the Red River within Reach II would fall within the upstream subbasins, and all water upstream of those reservoirs would be available for the unrestricted use of the State in which it is located.[2]

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[2] Because the dams themselves mark the boundary between Subbasin 5 and the upstream subbasins, and because water impounded by a dam necessarily floods land *upstream* of the dam, reservoirs at the border of Subbasin 5 necessarily fall within the upstream subbasins. Most of the water *in* those federal reservoirs, however, is considered "designated water" (1JA17 (§ 3.01(k)), which is not allocated by the Compact

In contrast, Louisiana, which is downstream of Arkansas, Oklahoma, and Texas, "has no reservoir sites of significant size" within the Red River Basin and thus (unlike the upstream States) "[can]not store water in times of high flows to meet future needs." 1JA27. To address that problem and the "opposing points of view" it generated, "the upstream states agree[d] to cooperate in assuring a reliable flow" of water to Louisiana in the main channel of the Red River at the Arkansas-Louisiana border, where the River crosses from Reach II, Subbasin 5 into Reach V. *Ibid.*[3]

The drafters accomplished this in three ways. *First*, Section 8.01 of the Compact grants Louisiana "free and unrestricted use" of all water that passes from Reach II, Subbasin 5 into Reach V, including the water of "the mainstem Red River." 1JA38.

Second—in contrast to the unilateral control that the Compact grants to Arkansas, Oklahoma, and Texas over in-state water in the four upstream subbasins of Reach II and to Louisiana over water in Reach V—the Compact provides that once water from a freshwater tributary in an upstream subbasin flows past the last major dam site into Subbasin 5, *all four* signatory States are entitled to a portion of

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(1JA10 (§ 2.02)). Water in excess of the federal designated capacity is considered "undesignated water" (1JA16-17 (§ 3.01(*l*)) that may be allocated by the Compact.

[3] By the time the Red River passes into Louisiana, upstream freshwater tributaries have diluted its salinity by nearly one half (S. Baldys, III, & D. K. Hamilton, *Assessment of Selected Water-Quality Data Collected in the Lower Red River (Main Stem) Basin, Texas, 1997-98*, Tbl. 2, http://tinyurl.com/Tarrant10), making it suitable for most residential and industrial uses.

that water. 1JA25 (§ 5.05(b)(3)). In particular, the Compact allocates to the signatory States

> *equal rights to the use* of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second.

Ibid. (§ 5.05(b)(1)) (emphasis added).

Finally, the Compact requires the three upstream States to administer water use (that is, to regulate and control it) so as to allow water in Subbasin 5 to pass, unused, into Louisiana during the rare times of low flow. Thus, during the 4% of the time (1JA30) that the flow of the River is less than 3,000 cubic feet per second (CFS) but greater than 1,000 CFS at the Arkansas-Louisiana border, the Compact requires "the States of Arkansas, Oklahoma, and Texas [to] allow to flow into the Red River for delivery to the State of Louisiana a quantity of water equal to 40 percent" of the water "originating in" and "flowing into subbasin 5." 1JA25 (§ 5.05(b)(2)). And during the 0.2% of the time (1JA30) that the flow is less than 1,000 CFS, the upstream States must allow *all* water "originating in" or "flowing into" Subbasin 5 to flow downstream to Louisiana. 1JA25 (§ 5.05(b)(3)). The Compact does not, however, require the "upstream states" with control over the first four subbasins in Reach II "to make releases from storage or to pass water from [the upstream] subbasins in order to

maintain the flow" of the Red River within Subbasin 5. 1JA30. See 1JA25 (§ 5.05(b)(2)).[4]

4. Although the Compact entitles each State to an "equal share" of Subbasin 5 water, an equal amount of that water is not physically located in each State: Whereas a majority of Subbasin 5's water is located in Oklahoma, far less than 25% is located in Texas, and *none* is located in Louisiana.[5] What is more, Subbasin 5 water in Texas is found largely in intermittent streams and dry arroyos that fill temporarily with water during the rainy seasons. CA App. 733, 1300-1301. Such sources of water are neither substantial nor reliable enough for large-scale municipal water projects.

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[4] The Compact accounts further for the "unusual" circumstance (Chapman, *supra*, at 96) in which the flow of the Red River is below 526 CFS at the Oklahoma-Arkansas border, yet above 3,000 CFS at the Arkansas-Louisiana border. See 1JA26 (§ 5.05(c)). That provision is not relevant here and, to our knowledge, has never been invoked.

[5] A 1970 engineering report submitted to the Compact's negotiating commission reported the average flows of the Red River and all of its tributaries into Subbasin 5 over a thirty-year span from the 1930s through the 1960s. See *Report of the Engineering Advisory Comm. to the Red River Compact Comm'n* (June 1970). Summing the flows of the freshwater tributaries running from Subbasins 2 and 4 in Texas into Subbasin 5, and dividing that sum by the sum of all tributaries flowing into Subbasin 5, indicates that, in 1970, just 16% of the freshwater flowing into Subbasin 5 was located in Texas. See *id.* at II-13–14, II-20, II-27–28, II-33–34, II-36. When the main channel of the Red River is taken into account, that number drops to 11%. *Ibid.* Oklahoma's share was 59%, including the main channel. *Ibid.* Petitioner has sought leave to lodge the 1970 report with the Clerk.

Consistent with Subbasin 5's status as a single geographic unit straddling state lines, provisions of the Red River Compact authorize the signatory States to cross state lines to obtain their apportioned share of water. Section 2.05(d) declares specifically that "[e]ach Signatory State shall have the right" to "[u]se the bed and banks of the Red River and its tributaries to convey stored water, imported or exported water, and water apportioned according to this Compact." 1JA11. Because the bed and banks of the Red River lie wholly within Oklahoma along its border with Texas, the Compact necessarily grants each State "the right" to enter Oklahoma to convey apportioned water. Section 2.05(c) additionally authorizes each State to "[c]onstruct reservoir storage capacity" for the "storage of water which is either imported or is to be exported if such storage does not adversely affect the delivery of water apportioned to any other Signatory State." *Ibid.*

5. General provisions of the Red River Compact further detail what the Compact's allocations mean. Section 2.01 provides that "[e]ach Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state." 1JA10. It provides that "[e]ach state may freely administer water rights and uses in accordance with the laws of that state," but makes clear that "such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact." *Ibid.* And, using generic language that appears in almost every interstate water compact, Section 2.10(a) provides that "[n]othing in this compact shall be deemed" to "[i]nterfere with or impair the right" of "any Signatory State to regulate within its boundaries the appropriation, use, and control of water," provided that its exercise of that right is "not in-

consistent with its obligations under this Compact." 1JA12.

B. Federal reservoirs within Reach II

At the same time that the signatory States began negotiating the terms of the Red River Compact, Oklahoma's congressional delegation was pursuing federal legislation to authorize the expansion or construction of several federal reservoirs in what would become Reach II, Subbasin 1. These included the Sardis and Tuskahoma federal reservoirs on the Kiamichi River, and an expansion of Hugo Lake, formed downstream on the Kiamichi by Hugo Lake Dam at the border of Subbasins 1 and 5.

The places in and purposes for which federal reservoir water may be put to use are established by recommendation of the Chief of the Army Corps of Engineers and codified by "subsequent specific authorization of the Congress by an authorization Act." 43 U.S.C. § 390. A federal reservoir project will not be authorized unless its benefits, including "present or anticipated future demand or need for municipal * * * water," exceed its costs. 43 U.S.C. § 390b(b). And when a federal water project is authorized for multiple purposes and places, the cost-benefit analysis must "be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction." *Ibid.*

At the time the reservoirs in Oklahoma were under consideration, Oklahoma's anticipated future water demands did not alone justify the cost of their construction. Thus, Oklahoma legislators represented that the demands of north Texas (and specifically the area served by Tarrant) should be taken into

account to justify Congress's authorization and subsequent funding of the projects. See, *e.g.*, *Hearings before a Subcomm. of the Sen. Comm. on Public Works*, 84th Cong., 2d Sess. (1956).

Relying upon those additional demands for water in North Texas, the Chief of Engineers modified the cost-benefit ratio and submitted a report to Congress recommending that the Hugo Lake reservoir be authorized to include water supply storage, and that the Sardis and Tuskahoma federal reservoirs be constructed, to meet anticipated future demand throughout "the central Oklahoma-north Texas region." S. Doc. No. 145, at 15, *Report of the District Engineer* ¶ 5(b)(2), 87th Cong. (Sept. 24, 1962), 1JA108. The supplement to the report found specifically that "[t]he metropolitan centers of Oklahoma City, Dallas, and Fort Worth * * * are going to need additional water supplies to sustain the anticipated growth" and that "the reservoirs in the Kiamichi River Basin could provide the water supply for these metropolitan areas." S. Doc. 145, Supplement A, *Summary of Findings*, at 204. Congress ultimately approved the Chief's recommendations in the Flood Control Act of 1962, Pub. L. No. 87-874, tit. II, 76 Stat. 1173, in which it "authorized" projects "substantially in accordance with the recommendations of the Chief of Engineers in Senate Document Numbered 145." 76 Stat. at 1187.

The only way for Texas to access water impounded by the Hugo, Sardis, and Tuskahoma dams in Oklahoma is to appropriate the water *from within Oklahoma*, either from the federal reservoirs or in Reach II, Subbasin 5 after water is released into the Kiamichi River from those reservoirs, before the

Kiamichi meets the main channel of the Red River. That water does not otherwise flow into Texas.

C. Tarrant's proposal to appropriate water from Oklahoma

1. In cooperation with other North Texas water suppliers, Tarrant provides water through its wholesale customers to more than six million residents of North Central Texas. Tarrant is charged with developing additional water resources to meet the current and future demands of the region. As Texas explained to this Court, Tarrant is "an entity created under Texas law * * * to obtain water" for Texas residents and is authorized to invoke, and obtain water pursuant to, "Texas's water rights under the Red River Compact." Texas Cert. Amicus Br. 1-2.

Tarrant is in dire need of new sources of water. CA App. 86. By 2060, the population of Dallas-Fort Worth—already the fourth largest metropolitan area in the country, contributing approximately 3% of the Nation's GDP (U.S. Bureau of Economic Analysis, *Survey of Current Business* (Oct. 2011), http://tinyurl.com/tarrant22 (see Table 5))—is projected to double, and Tarrant's demand alone will exceed supply by more than 400,000 acre-feet per year. CA App. 86.[6] "Without additional water supplies," over the next several decades Texas will face a "nearly unimaginable" water deficit that will "cost Texas businesses and workers up to $116 billion." Manny Fernandez, *As Texas Bakes in a Long Drought, Water Becomes a Focus for Legislators*, N.Y. Times (Jan. 12, 2013), http://tinyurl.com/tarrant9. See also Texas

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[6] An acre-foot is the volume of one acre of surface area to a depth of one foot and is the equivalent of approximately 325,000 gallons.

Water Development Board, *Water for Texas: 2012 State Water Plan* 183, http://tinyurl.com/tarrant16.

In addition to those long-range needs, Tarrant faces an imminent water shortage as a result of extreme drought. CA App. 804-805. Media coverage has described the drought as "catastrophic," costing Texas more than $5 billion in recent agricultural losses. Kate Galbraith, *Catastrophic Drought in Texas Causes Global Economic Ripples*, N.Y. Times (Oct. 30, 2011), http://tinyurl.com/tarrant6.

Oklahoma, by contrast, sits in the heart of the Mississippi River watershed and is, in the words of respondent Oklahoma Water Resources Board (OWRB), "blessed with an abundance of water." *2012 Oklahoma Comprehensive Water Plan*, Executive Report 3, http://tinyurl.com/tarrant15. Because Oklahoma contains water-rich territory north of the Red River, its share of Reach II has not been affected by the recent drought as directly as has Texas's share. Indeed, OWRB estimates that the entire State of Oklahoma currently uses less than two million acre feet per year of stream water. *Id.* at Executive Report 4. Another *34 million acre-feet* of unused water flows out of Oklahoma annually, bound for the Gulf of Mexico. CA App. 112-113, 367-368, 805-806. From the southeast part of Oklahoma alone, more than twelve times the volume of Tarrant's entire projected 2060 shortfall is discharged, unused, into the Gulf of Mexico each year. *Id.* at 90. And the OWRB has acknowledged that "the average annual flow of the six major river basins in southeastern Oklahoma is 6,363,628 acre-feet," which is enough to supply the entire State of Oklahoma three times over. 2JA364. That is the equivalent of nearly one half of the entire flow of the Colorado River, which supplies nearly all

the water used by the Colorado Springs, Denver, Phoenix, Tucson, Las Vegas, Los Angeles *and* San Diego areas. See U.S. Geological Survey, *Climatic Fluctuations, Drought, and Flow in the Colorado River Basin*, Fig. 3 & accompanying text, http://tinyurl.com/tarrant23.

2. Tarrant has identified Reach II, Subbasin 5 water apportioned by the Compact to Texas—but located in Oklahoma, a short distance north of its border with Texas—as the most practical source of water for addressing North Texas's immediate and long-term needs. In the permit application underlying this lawsuit, Tarrant proposes taking 310,000 acre-feet of Texas's share of Reach II, Subbasin 5 water from the Kiamichi River, below the Hugo Lake Dam, immediately above where the Kiamichi discharges into the Red River. See App., *infra* (map). The proposal involves placing pumps in the Kiamichi and running underground pipelines to existing reservoirs serving Tarrant and other regional water suppliers. Because the plan uses existing reservoir infrastructure and does not involve pumping water vast distances to a higher elevation, it has a substantially smaller environmental impact than Tarrant's other options.[7]

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[7] Alternatives to drawing water from Oklahoma would involve obtaining water from sources to the south and east of the Metroplex and pumping the water up several hundred feet of elevation over hundreds of miles. These alternatives—which include taking water from Toledo Bend Reservoir on the Louisiana Border or developing a new lake known as Marvin-Nichols—are substantially more expensive than the Oklahoma project (*Water for Texas: 2012 State Water Plan* 48, 253-254, http://tinyurl.com/tarrant16) and involve far greater environmental impacts, requiring both new infrastructure and massive electricity usage.

Oklahoma law requires any entity (including any "state or federal governmental agency" like Tarrant) that "intend[s] to acquire the right to the beneficial use of any water" in Oklahoma to apply to the OWRB for "a permit to appropriate" before "commencing any construction" or "taking [any water] from any constructed works." Okla. Stat. tit. 82, § 105.9. In conformity with Compact § 2.10(a), which recognizes the "power of [each] Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, not inconsistent with its obligations under this Compact" (1JA12), Tarrant accordingly filed an application for a permit to appropriate surface water from the Kiamichi River. Pet. App. 55a; CA App. 805-806, 811. By stipulation of the parties, OWRB will take no official action on any of Tarrant's permit applications until this litigation is concluded.

D. Oklahoma's water embargo

Notwithstanding Oklahoma's enormous water reserves and Texas's right to a 25% share of Reach II, Subbasin 5 water, Oklahoma has enacted a panoply of laws that, taken together, prohibit OWRB from issuing permits for the appropriation of water for out-of-state use.[8] These discriminatory laws categorically prevent an out-of-state user like Tarrant from obtaining water anywhere in Oklahoma.

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[8] Prior to this lawsuit, Oklahoma had in force an outright statutory prohibition on exports of water for out-of-state use. See Okla. Stat. tit. 82, § 1B (2009 Supp.); Okla. Stat. tit. 74, § 1221.A (2009 Supp.). The moratorium expired in 2009, during the pendency of this action, and was replaced with the collection of discriminatory statutes discussed in text.

Oklahoma Attorney General opinion. The Attorney General of Oklahoma has opined, in an official directive to OWRB's executive director (1JA112-119), that the Oklahoma legislature would never allow "such a valuable resource as water [to] become bound, without compensation, to use by an out-of-state user"; therefore, according to the Attorney General, no "out-of-state user is a proper permit applicant before the Oklahoma Water Resources Board." *Tarrant Reg'l Water Dist.* v. *Sevenoaks*, 545 F.3d 906, 909 (10th Cir. 2008) (quoting Okla. Att'y Gen. Op. No. 77-274 (1978)). As the Tenth Circuit recognized in an earlier appeal in this case, OWRB is "required to follow [the] attorney general's opinion until a court determines otherwise." *Tarrant*, 545 F.3d at 909 n.2 (citing *Hendrick* v. *Walters*, 865 P.2d 1232, 1243 (Okla. 1993)). No intervening judicial decision has "relieve[d] OWRB officers from compliance with the attorney general's opinion." *Ibid.*

Oklahoma's express public policy against water exportation. It is Oklahoma's express policy that "[w]ater use within Oklahoma * * * be developed to the maximum extent feasible for the benefit of Oklahoma so that out-of-state downstream users will not acquire vested rights therein to the detriment of the citizens of this state." Okla. Stat. tit. 82, § 1086.1(A)(3), 1JA96. Because out-of-state use of water necessarily precludes in-state use of that water for any purpose, *any* permit to appropriate water for out-of-state use is "to the detriment" of Oklahomans. In acting on applications for permits to appropriate, OWRB is statutorily required to "effectuat[e]" this policy. *Id.* § 1086.2, 1JA96-97.

Impractical and discriminatory time restrictions. Any permit that OWRB issues to an out-of-state water user must include a time restriction that, as a practical matter, is a categorical bar to major municipal proposals like Tarrant's. In particular, surface water appropriated for out-of-state use must be "put to beneficial use within a period of less than seven years." Okla. Stat. tit. 82, § 105.16(A), 1JA94. That means that Tarrant would have just seven years to begin delivering its *entire* annual allotment of water under the permit. That time limit effectively makes Oklahoma water unavailable to Tarrant, which plans a water project that would require at least fifteen years of planning and construction. The same time restriction does not apply to permits that "promote the optimal beneficial use of water in the state." *Id.* § 105.16(B), 1JA94-95.

Facial discrimination. To the extent the permitting scheme allows OWRB to issue out-of-state permits at all, its standards are facially discriminatory. Oklahoma's permitting scheme establishes an express preference for in-state uses over "[u]se[s] of water outside the state." Okla. Stat. tit. 82, § 105.12A, 1JA93. In passing on an application for out-of-state use, OWRB must, for example, "evaluate whether the water that is the subject of the application could feasibly be transported to alleviate water shortages in the State of Oklahoma" instead. *Id.* § 105.12(A)(5), 1JA91. All permits for out-of-state water use are subject to review at least as often as every 10 years (and could be reviewed more frequently), at which time OWRB is empowered to impose additional conditions (including total divestiture) on the permitted out-of-state uses. *Id.* § 105.12(F), 1JA92. Permits for in-state use are not subject to the

same review requirement, which is incompatible with effective municipal water supply planning.

The practical upshot of this statutory scheme is a categorical prohibition against permits to appropriate Oklahoma surface water for use in another State. OWRB is legally obligated to reject Tarrant's application under the Oklahoma Attorney General's opinion and Oklahoma Statutes, title 82, section 1086.2. The law further requires that, even if Tarrant were issued a permit, because it is an out-of-state water user it must put the water to use within seven years (*id.* § 105.16) and is subject to divestiture at any time (*id.* § 105.12(F))—infeasible conditions given the enormous commitments of resources and time necessary to execute a project of the size that Tarrant proposes. And apart from the outright embargo, Oklahoma law expressly favors in-state water users, whose interests must be given top priority under Oklahoma Statutes, title 82, sections 105.12 and 105.16.

E. The decisions below

At the same time that Tarrant filed its permit applications, it brought this suit against OWRB alleging that (1) the Red River Compact preempts the Oklahoma statutes that prevent Tarrant from appropriating Texas's share of Subbasin 5 from within Oklahoma; and (2) Oklahoma's water embargo laws violate the dormant Commerce Clause by discriminatorily restricting interstate commerce in water.

1. Tarrant's complaint indicates that it intends to comply fully with the generally applicable requirements for obtaining a permit to appropriate water in Oklahoma and does not seek a court order requiring OWRB to issue a permit on any particular terms. Instead, it requests a declaratory judgment and injunc-

tive relief preventing Oklahoma from enforcing its anti-export laws as an element of the OWRB's permit decisionmaking process. See Am. Compl. Prayer for Relief ¶ A, 1JA172 (seeking a judgment declaring "the invalidity" of "Oklahoma's Anti-Export Laws" and that "no adverse action may be taken against Plaintiff's Applications or efforts to purchase or export water in Oklahoma based solely upon the fact that Plaintiff is a nonresident of Oklahoma or seeks to deliver or use the appropriated water outside of Oklahoma"); *id.* ¶ B, 1JA172-173 (seeking "a permanent injunction forbidding Defendants * * * from enforcing the Anti-Export Laws or abiding by Oklahoma Attorney General Opinion No. 77-274").

The district court granted summary judgment to respondents. Pet. App. 53a-74a. With respect to Tarrant's preemption claim, it reasoned simply that "there is no necessary conflict between the [Compact] and the state laws plaintiff challenges" because the Compact "explicitly states it is not intended to supplant any state legislation if it is otherwise consistent with the compact." Pet. App. 70a.

Addressing the dormant Commerce Clause, the court focused not only on "the language of the [Compact]" but also on its "nature" and "purpose." Pet. App. 66a-67a. Although acknowledging that "[t]he language of the RRC does not explicitly say 'states can limit or stop the out-of-state shipment of water' nor does it make any explicit reference to the Commerce Clause," the court concluded that "the essence" of the Compact "is inherently inconsistent with the standards that would *otherwise* apply based on dormant Commerce Clause analysis." *Ibid.* Because, in the district court's view, "the superseding effect" of the Compact was to give "residents of one

state a preferred right of access, over out-of-state consumers, to natural resources located within its borders," Congress's approval of the Compact "*necessarily* constituted its consent to a legal scheme different from that which would otherwise survive Commerce Clause scrutiny." *Id.* at 67a-68a.

2. The Tenth Circuit affirmed. Pet. App. 1a-52a. With respect to preemption, the court evidently realized that state powers may not be exercised in a manner inconsistent with the terms of the Compact. But it believed that the "equal rights to the use of" water in Reach II, Subbasin 5 guaranteed by Section 5.05(b)(1) of the Compact, when read in the context of the minimum flow provisions that appear elsewhere in Section 5.05, merely ensures that "an equitable share of water from the subbasin reaches the states downstream from Oklahoma and Texas." Pet. App. 36a. In particular, the court opined that the provision "secures Louisiana's interests indirectly by ensuring that that the three upstream states will not take more than 25 percent each of the excess water, allowing the remaining 25 percent to flow downstream to Louisiana." *Id.* at 38a. On this view, "'[e]qual rights to the use of' can reasonably be read to mean that each signatory state has the same opportunity and entitlement to use up to 25 percent of the excess water *in its state* and under its state laws." *Id.* at 42a-43a (emphasis added).

Once minimum downstream flow requirements are met, the court concluded, Section 5.05 does not entitle a "Texas user" to "take Texas's share of that water from a tributary located in Oklahoma," even though Texas's share is not available to it from sources in Texas. Pet. App. 40a; see *id.* at 44a n.3 (finding immaterial whether Texas could obtain 25

percent of subbasin 5 water from in-state sources). In reaching that conclusion, the court was influenced by the presumption against preemption, which it deemed "particularly strong in this case." *Id.* at 34a; see *id.* at 35a-36a. Having read the Compact in this way, the court held that it does not conflict with the discriminatory Oklahoma law.

In addressing the dormant Commerce Clause issue, the court recognized that the "standard for determining Congress's intent to consent to state statutes" that otherwise would violate the Clause is the rigorous one set out in *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), and *South-Central Timber* v. *Wunnicke*, 467 U.S. 82 (1984), which requires that congressional consent be "expressly stated" or otherwise "unmistakably clear." Pet. App. 19a-20a. But the court held that "the broad language" of the Compact provides the necessary "clear statement of congressional authorization of state regulation." *Id.* at 24a.

The court reasoned that "the Compact provisions using words and phrases such as 'unrestricted use,' 'control,' 'in any manner,' 'freely administer,' and 'nothing shall be deemed to interfere' give the Oklahoma Legislature wide latitude to regulate interstate commerce in its state's apportioned water." Pet. App. 27a. Relying in part on the Compact's "Interpretive Comments"—which "the Compact's Negotiating Committee wrote" so "future readers might be apprised of the intent" of the drafting committee (*id.* at 4a)—the court determined that these scattered provisions, "[t]aken together," satisfy the clear statement standard of *Sporhase* and *Wunnicke*. *Id.* at 24a-25a, 27a-28a.

SUMMARY OF THE ARGUMENT

I. The Red River Compact guarantees Texas "equal rights to the use of" specified water. In its holding below, however, the Tenth Circuit held that the Compact does not mean what it plainly says, and that Texas may not in fact obtain its equal share of that water. For several reasons, that holding is insupportable.

First, a compact, like a statute, must be interpreted in accordance with its plain terms. And here, the Compact's language is unambiguous. It apportions the excess water of Reach II, Subbasin 5 without reference to state lines, instead granting each of the four signatory States "equal rights to the use" of all water "originating in subbasin 5" or "flowing into subbasin 5," with "no state entitled to more than 25 percent of the excess water." That language could not be clearer: Each of the four States has equal rights to use of the water, no matter where in the subbasin that water is located. In contrast, the drafters expressly and repeatedly allocated water by reference to state lines *elsewhere* in the Compact—which shows that the omission of state borders from the allocation of Subbasin 5 water was not accidental. And the Compact expressly allows signatory States to construct storage, import and export water apportioned under the Compact, and use the bed and banks of the Red River to transfer water across state lines, which also reflects the drafters' understanding that other States could enter Oklahoma for that purpose.

Second, the Tenth Circuit's reading does more than depart from the Compact's plain terms; it makes no sense at all. The Compact allocates Louisiana a 25% share of excess Subbasin 5 water,

although no portion of Subbasin 5 is within Louisiana. If the signatory States may use only the portion of Subbasin 5 water that lies within their borders, as the Tenth Circuit held and respondents argue, the treatment of Louisiana becomes nonsensical. And it is no answer to this point to suggest, as did the Tenth Circuit, that the Compact was designed simply to allow for an uninterrupted downstream flow of water to Louisiana from the three upstream States during times of low flow. Had that been the singular goal of Section 5.05, there would have been no reason to create a separate Subbasin 5 at all.

Third, if there were any doubt on that score, extrinsic evidence would confirm that the Compact's drafters intended that each State be entitled to an equal share of Subbasin 5 water. Thus, the Compact's drafting history shows that the States considered, and *rejected*, limiting access to Reach II, Subbasin 5 water by state lines. Other elements of the history show that the drafters both knew that Texas could not access an equal share of Subbasin 5 water from within its own borders and assumed the States would have cross-border access to water in Subbasin 5. And federal reservoir projects located just upstream from Subbasin 5 were sought (by Texas *and* Oklahoma), and authorized by Congress while the Compact was being negotiated, on the express guarantee that the water generated by those projects would be available for use in Texas. Texas water users can benefit from those reservoirs only by obtaining water from within Oklahoma.

II. Oklahoma's discriminatory water legislation, which would preclude Texas users from obtaining water located in but not apportioned to Oklahoma, also cannot survive scrutiny under the Commerce

Clause. That legislation, which discriminates on its face against out-of-state water users, is virtually *per se* unconstitutional. Although recognizing that principle, the Tenth Circuit thought that Congress authorized Oklahoma's legislation by approving the Compact. But such authorization is found only when Congress expressly announces its approval for discriminatory state laws. The provisions of the Compact invoked by the court of appeals, however, say nothing whatsoever about the Commerce Clause or state authority to discriminate against interstate commerce. It is immaterial that some provisions of the Compact generally defer to state water law; as this Court has recognized, such general language must be understood as deferring only to *valid* state law, an ingredient of which is conformity with the requirements of the Commerce Clause.

ARGUMENT

I. THE RED RIVER COMPACT PREEMPTS STATE LAW THAT PREVENTS TEXAS FROM OBTAINING ITS SHARE OF SUBBASIN 5 WATER FROM OKLAHOMA.

"A compact is a contract" or a "bargained-for exchange between its signatories." *Kansas* v. *Colorado*, 533 U.S. 1, 20 (2001) (citing *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987)). But to take effect, an interstate compact must be approved by Congress, which "transforms [the] compact into a law of the United States." *Virginia* v. *Maryland*, 540 U.S. 56, 66 (2003) (quoting *New Jersey* v. *New York*, 523 U.S. 767, 811 (1998)). Thus, "an interstate compact is not just a contract," but also "a federal statute enacted by Congress." *Alabama* v. *North Carolina*, 130 S. Ct. 2295, 2312 (2010). And any state law that "stands as an obstacle to the accomplishment and execution of

the full purposes and objectives" of a federal law is "preempted." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1753 (2011) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). See also *Del. River Joint Toll Bridge Comm'n* v. *Colburn*, 310 U.S. 419, 433-434 (1940) (state law "ha[s] no force" when inconsistent with the "terms" of a "Compact").

The plain language of the Red River Compact therefore resolves this case. The Compact provides that the four signatory States have "equal rights to the use" of, and that no State is "entitled to more than 25 percent" of, the water in Reach II, Subbasin 5. 1JA25 (§ 5.05(b)(1)). Oklahoma's water export embargo, which is preventing Texas from accessing its full, 25% share of Subbasin 5 water, is a manifest obstacle to the accomplishment of that purpose. And if there were any doubt on that point, the extrinsic evidence would resolve it in Tarrant's favor. On the basis of preemption alone, the judgment below should be reversed.

A. The plain language of the Compact authorizes Texas to cross state lines to obtain its equal share of Subbasin 5 water.

An interstate compact, like any other "legal document," must be "construed and applied in accordance with its terms." *Texas*, 482 U.S. at 128. "Just as if a court were addressing a federal statute," therefore, "the first and last order of business of a court addressing an approved interstate compact is interpreting the compact." *New Jersey*, 523 U.S. at 811 (quoting *Texas* v. *New Mexico*, 462 U.S. 554, 567-568 (1983)). And the Court "must presume" that the Compact "says * * * what it means and means * * * what it says." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). Here, the Compact's language is

unambiguous and controlling: Texas may access its share of Subbasin 5 water in Oklahoma.

1. The Compact apportions Reach II, Subbasin 5 water without a word about state lines. Instead, it delineates Subbasin 5 by reference to the "last downstream major damsites" along the major tributaries to the Red River within all three upstream States, creating a single subbasin that includes territory in Arkansas, Oklahoma, and Texas. 1JA22-24 (§§ 5.01-(a), 5.02(a), 5.03(b), 5.04(a)). And when the flow of the Red River at the Arkansas-Louisiana border is 3,000 CFS or greater, the Compact gives those three States *and* Louisiana "*equal rights* to the use" of all water "originating in subbasin 5" or "flowing into subbasin 5," on the condition that "no state is entitled to more than *25 percent* of the [excess] water." 1JA25 (§ 505(b)(1)) (emphasis added). The Compact places no geographic limitation on the signatories' exercise of those equal rights or their "entitle-[ments]" to "25 percent" of the water. *Ibid.*

The plain meaning of those words is clear: Arkansas, Louisiana, Oklahoma, and Texas have "equal rights" to the use of all water "originating in subbasin 5" or "flowing into subbasin 5," *regardless where in the subbasin the water is located or where it originated.* If the drafters "had intended" to impose state-line limits on the allocation of Subbasin 5 water, they would have "sa[id] so in simple language" (*Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 251 (1985)) and with "far more clarity" (*Montana* v. *Wyoming*, 131 S. Ct. 1765, 1778 (2011)). The "most natural interpretation" of Section 5.05(b)(1)'s "silence" concerning state lines is that the drafters "did not intend to [allocate water by state

lines] in that section." *Mims* v. *Arrow Fin. Serv., LLC*, 132 S. Ct. 740, 750 (2012).

2. That conclusion is confirmed by language used elsewhere in the Compact. There, the Compact's drafters repeatedly and expressly *did* allocate water by reference to state lines. Reach V, for example, is defined as "the mainstem Red River and all of its tributaries lying wholly within the State of Louisiana," and unrestricted use of that water is allocated to Louisiana. 1JA38 (§ 8.01). Similarly, two of the four upstream subbasins in Reach II include only those "streams and their tributaries" that lie "wholly in" either Oklahoma or Texas; the water in each subbasin is allocated to those two States, respectively. 1JA22-23 (§§ 5.01(a), 5.02(a)).

In other instances, the drafters apportioned the water of subbasins that traverse state lines by express reference to state borders. Reach II, Subbasin 3, for example, includes territory in both Oklahoma and Arkansas. 1JA23-24 (§ 5.03). But the drafters did not intend Oklahoma and Arkansas to share Subbasin 3 water equally. Thus, the Compact grants "free and unrestricted use of the water of this subbasin" to Oklahoma and Arkansas "*within their respective states*." 1JA23 (§ 5.03(b)) (emphasis added). Similarly, Reach III, Subbasin 3 traverses the Texas-Louisiana boundary. 1JA33 (§ 6.03). The drafters, again, did not intend an equal allocation, providing that "Texas and Louisiana *within their respective boundaries* shall each have the unrestricted use of the water of this subbasin." *Ibid.* (§ 6.03(b)) (emphasis added).

Against this background, it is plain that, when the Compact's drafters "considered it appropriate" to allocate water using state boundaries, they used

"concise language directed to that end." *Mountain States*, 472 U.S. at 251. But they declined to do so when allocating the water of Reach II, Subbasin 5. That approach must be regarded as intentional: The interpretation of a legal document "is a holistic endeavor" and the meaning of a written provision is "clarified by the remainder of the statutory scheme." *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Accordingly, "[i]n ascertaining the plain meaning of [a] statute," courts "must look" not only "to the particular statutory language at issue," but also "the language and design of the statute as a whole." *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988). See *United States* v. *Atl. Research Corp.*, 551 U.S. 215, 221 (2007) ("Statutes must be 'read as a whole.'"). And "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983). That principle governs here.

That conclusion also is consistent with other sections of the Compact providing expressly for cross-border transfers of water. Section 2.05(c), for example, allows the signatory States to construct storage facilities for water that is to be transported, so long as the delivery will not have an adverse impact on another State's apportionment. 1JA11. And Section 2.05(d) provides that the signatory States may "[u]se the bed and banks of the Red River and its tributaries to convey * * * water apportioned according to this Compact." *Ibid.* As we have explained, the bed and banks of the Red River, which lie north of the south vegetation line, are wholly within Oklahoma along that State's border with Texas. Section 2.05(d)

thus not only contemplates that "water apportioned according to this Compact" may be "convey[ed]" across state lines, but authorizes entry into Oklahoma for that purpose.

3.a. Of course, the court of appeals disagreed. In holding that the Compact gives Texas no right to acquire Subbasin 5 water outside its own boundaries, it opined that the words "'[e]qual rights to the use of' can reasonably be read to mean that each signatory state has the same opportunity and entitlement to use up to 25 percent of the excess water *in its state* and under its state laws." Pet. App. 42a-43a (emphasis added). That is wrong for two reasons.

First, the court of appeals' interpretation simply ignores the Compact's actual language. In ordinary usage, "equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subasin5" can*not* be read to mean "opportunity to use up to 25 percent of excess water in its state." There is no denying that Subbasin 5 is defined as a single geographic unit and apportions water without reference to state lines. There is thus no textual basis for reading the Compact's grant of "equal rights" to the excess Subbasin 5 water as meaning that each signatory State is limited "to 25 percent of [such] water *in its state*" (Pet. App. 43a). And the absence of an express state-line limitation from Section 5.05(b)(1) hardly can be deemed accidental. As we have noted, other sections of the Compact make clear that, when the drafters meant to allocate the water of multistate subbasins by reference to state lines, they did so expressly. See 1JA23-24, 33-45 (§§ 5.03(b), 6.03(b)). That is enough, in itself, to refute the Tenth Circuit's interpretation: It is fundamental that the courts may not, in the guise of interpretation, "read absent

terms into" or otherwise "rewrite" an "agreement among sovereign States." *Alabama*, 130 S. Ct. at 2312-2313 (citing *Texas*, 462 U.S. at 564).

Second, the Tenth Circuit's interpretation fails to account for the fact that Louisiana—although allocated a 25% share of excess Subbasin 5 water—has *no* such water within its State. The court's conclusion that the Compact authorizes each State to use only "25 percent of the excess water *in its state*" (Pet. App. 43a (emphasis added)) thus renders Louisiana's allotment meaningless. But the allocation "cannot be meaningless, else [it] would not have been [made]." *United States* v. *Butler*, 297 U.S. 1, 65 (1936).

It is no answer to say, as did the Tenth Circuit, that "[Section] 5.05(b)(1) secures Louisiana's interests" in Subbasin 5 water "indirectly by ensuring that the three upstream states will not take more than 25 percent of the excess water, allowing the remaining 25 percent to flow downstream to Louisiana." Pet. App. 38a. If that were what the drafters had wanted to accomplish—to ensure that Louisiana received some quantity of water downstream, in Reach V—allocating the water to Louisiana *upstream*, in Reach II, Subbasin 5 would have been a very strange way to do it.

In fact, when the drafters intended to ensure downstream delivery elsewhere, they said so simply and expressly. For example, the drafters allocated all of Reach IV, Subbasin 2 to Arkansas. But that subbasin—like Reach II, Subbasin 5—lies immediately upstream of Louisiana, and the drafters wanted to ensure that some percentage of its water would be preserved for downstream use by Louisiana. Thus, Section 7.02(b) apportions that water exclusively to Arkansas but requires Arkansas to allow "forty (40)

percent of the total weekly runoff originating above the state boundary to flow into Louisiana." 1JA37. The drafters did *not* apportion to Louisiana a share of the water upstream in Arkansas, on the unspoken assumption that the allocation simply would "flow downstream," unused by Arkansas, "to Louisiana" for Louisiana's "indirect[]" benefit. Pet. App. 38a.

Indeed, the point is made clear by the drafters' treatment of Reach II, Subbasin 5 itself. Like Section 7.02(b), Section 5.05(b)(2)—which governs Subbasin 5 during times of low flow—provides that, when the river's flow is below 3,000 CFS at the Arkansas-Louisiana boundary, the three upstream States must allow 40% of all Subbasin 5 water "to flow into the Red River for delivery to the State of Louisiana." 1JA25.

But that very notably is *not* the language that drafters used to allocate Subbasin 5 water during times of *high* flow. The Compact does not say that when the flow of the River is above 3,000 CFS, the three upstream States must allow 25% of Subbasin 5 water "to flow into the Red River for delivery to the State of Louisiana," as the Tenth Circuit would have it. On the contrary, it provides that *all four* States "have equal rights to the use" of the water "originating in" and "flowing into subbasin 5." 1JA25 (§ 5.05-(b)(1)). That language plainly allocates equal shares of Subbasin 5 water *in* Subbasin 5. And there would have been no reason to allocate Louisiana's share *upstream*, in Subbasin 5, unless the drafters intended for Louisiana to be able to *access* its share of the water there. The Compact therefore necessarily authorizes the States to cross state lines to obtain their shares of Subbasin 5 waters. That is especially so because the drafters also were aware that the distribution of Subbasin 5 water is dramatically uneven

among the three upstream States, and that Texas could not possibly access an equal portion of the subbasin's excess flows within its own borders, either. See *supra*, at 9 n.5. The Tenth Circuit's contrary reading "does not follow from the text and would drastically redefine" Section 5.05(b)(1). *Montana*, 131 S. Ct. at 1778.

b. Respondents' slightly different reading of the Compact fares no better than the Tenth Circuit's. As they see it, the words "allocate" and "state," taken together, connote a state-boundary limitation. Thus, they say, "[t]he phrase 'equal rights' simply means that within this subbasin, each state can authorize the use of water within the state, but, ultimately, its use cannot exceed an amount equal to what is used by other states." Opp. 31. That reading suffers from the same two problems that are inherent in the court of appeals' interpretation.

First, respondents' approach similarly adds words that the drafters omitted from the Compact. Section 5.05(b)(1) simply does not say that "the signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5 *within their respective boundaries*." See 1JA25. That the Compact "allocates" water to the signatory States does not provide the missing words. The word "allocate" means "to apportion" or, more specifically, "to deal out (something limited in supply) according to an allowance schedule." *Webster's Third New International Dictionary* 57 (1986). Nothing in the ordinary meaning of that word suggests that an agreement that "allocates" water among States cannot "apportion" or "deal out" to Texas water located in Oklahoma, especially water located in a region spanning three States

and allocated without reference to its State of origin. By insisting that Section 5.05 contains an unspoken state-boundary limitation, respondents therefore seek (and the Tenth Circuit granted) "not a construction of [the Compact], but, in effect, an enlargement of it by the court." *Iselin* v. *United States*, 270 U.S. 245, 251 (1926). And "[t]o supply omissions transcends the judicial function." *Ibid.* See also, *e.g.*, *Bilski* v. *Kappos*, 130 S. Ct. 3218, 3226 (2010).

Second, respondents' approach—like the Tenth Circuit's—fails to grapple with the allocation of Subbasin 5 water to Louisiana. Respondents say Section 5.05(b)(1) authorizes each signatory State to use only that excess Subbasin 5 water that is "within the state," and then only in an amount that does not "exceed an amount equal to what is used by other states." Opp. 31. But Louisiana does not have *any* Subbasin 5 water "within the state"; as soon as Reach II, Subbasin 5 crosses the border into Reach V it becomes Reach V water, apportioned exclusively to Louisiana. 1JA38 (§ 8.01). Taken literally, respondents' reading would preclude any State from using any Subbasin 5 water at all. That makes no sense—and "[a]bsurd results are to be avoided." *McNeill* v. *United States*, 131 S. Ct. 2218, 2223 (2011) (quoting *United States* v. *Wilson*, 503 U.S. 329, 334 (1992)).

B. Respondents' and the court of appeals' readings of the Compact ignore the structure and purpose of Reach II.

The design and purpose of Reach II confirm that the Compact apportions Subbasin 5 water without regard for state lines.

1. As we have explained (*supra* at 7-8), the water of each of the four upstream subbasins of Reach II is

apportioned to the State within which that water is located. The States therefore enjoy "unrestricted use" of the water "within their respective states" in the upstream subbasins. 1JA22-24 (§§ 5.01-5.04). The four upstream subbasins are separated from Subbasin 5 by reference, in turn, not to state borders, but instead to the "existing, authorized or proposed last downstream major damsites" along the major freshwater tributaries to the Red River, as they flow from the four upstream subbasins into Subbasin 5. *Ibid.* (§§ 5.01(a), 5.02(a), 5.03(b), 5.04(a)).

The definition of Subbasin 5's boundaries by reference to the last downstream dam sites along the major freshwater tributaries to the Red River accomplishes two crucial objectives: equal sharing of benefits when water is plentiful and equal sharing of burdens when it is not. It does this in two ways.

First, Section 5.05 ensures that, because reservoirs necessarily form upstream of the dams that create them, any reservoirs located along the Red River's major tributaries fall within the *upstream* subbasins, over which the upstream States have "unrestricted" control. The upstream States are therefore able to store whatever water they need for their own uses, allowing only surplus water to flow (unused) from the upstream subbasins into Subbasin 5. As relevant here, for example, the only water from Subbasin 1 that flows down the Kiamichi River into Subbasin 5 necessarily is surplus water that Oklahoma allows to flow past Hugo Dam, where Oklahoma can impound any upstream water it requires for its own use.

The upshot is that Subbasin 5 consists only of surplus water released from upstream reservoirs that the upstream States intend *not* to use. That ex-

plains the States' willingness to share Subbasin 5 water equally during times of high flow, regardless of state lines. By allowing the water to pass into Subbasin 5, the upstream States (primarily Oklahoma) are expressing an intent not to retain exclusive use of the water. Thus, "[w]hen the flow is high, * * * all states are free to use whatever amount of [Subbasin 5] water they can put to beneficial use," subject to the 25% cap. 1JA29-30.

Second, the provision ensures that the three upstream States guarantee downstream flow to Louisiana *equally* and that no State bears a disproportionate burden during low flows. It does so by providing that the upstream States are not obligated to "release stored water" from their upstream reservoirs (1JA25 (§ 5.05(b)(2))) to meet the downstream flow requirements to Louisiana.[9] Instead, the downstream flow is guaranteed exclusively from the shared, surplus water of Subbasin 5. As a consequence, the upstream States contribute only what they allow to flow into Subbasin 5, and no upstream State is made to release its own stored water for Louisiana's sake during drought.

2. Respondents' and the Tenth Circuit's interpretations of Section 5.05(b)(1) turn that arrangement on its head. Most fundamentally, the Compact's drafters would have had no reason to create a separate Subbasin 5 had they not intended to allow the States

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[9] The court of appeals thought that the upstream States' right to retain stored water even in times of low flow "reinforces the [Compact's] emphasis on state control." Pet. App. 38a. That may be so, but an "emphasis on state control" over stored water in the *upstream* subbasins hardly suggests that the Compact's drafters meant by implication to allocate downstream water in Subbasin 5 according to state lines.

equal shares of Subbasin 5 water during times of high flow. Instead, the drafters could have divided Reach II into the first four subbasins alone (extending each downstream into the territory that is now Subbasin 5) and simply required the upstream States to guarantee a downstream flow to Louisiana from the water "within their respective states." That is not the arrangement the States agreed to—but it is, in effect, how the Tenth Circuit read the Compact, treating it as though it subdivided Subbasin 5 into three units corresponding to the state lines of Arkansas, Oklahoma, and Texas.

Beyond that, no practical purpose would be served by limiting each upstream State "to 25 percent of [excess] water in its state," as the Tenth Circuit suggests. Pet. App. 42a. If, for example, Oklahoma municipalities need additional sources of water, there would be no reason for any of them to appropriate water from an Oklahoma tributary *in Subbasin 5* (where respondents' and the Tenth Circuit's equal-rights "limitation" would apply), when those municipalities could just as easily appropriate the same water a few miles upstream *in Subbasin 1* (where the limitation would *not* apply) before it flowed into Subbasin 5. It is hard to imagine why the drafters would have placed a cap on the upstream States' right to use Subbasin 5 water within their own boundaries, while at the same time providing such an obvious means of circumventing that limitation. But it is easy to see why they would have capped the amount that could be taken from Subbasin 5 if each State were authorized to share equally in the excess.

Finally, the Tenth Circuit was simply wrong to conclude that the *sole* purpose of Subbasin 5 is "to

ensure that an equitable share of water from the subbasin reaches the states downstream from Oklahoma and Texas." Pet. App. 36a, 39a. As the government recognized in its certiorari-stage brief (at 14), Subbasin 5 "does more than ensure that downstream states receive adequate water during low flow periods"; it *also* "apportions the subbasin's excess water when the flow *exceeds* 3000 cubic feet per second" (which it does 96% of the time), and it does so in equal, 25% shares. See also 2JA47 (meeting minutes showing that Section 5.05 gives both "[a]ssurance of a minimum flow" and "an equitable [apportionment] of the free [surplus] water"). The Tenth Circuit simply ignored that express purpose.

C. Neither deference to state water law nor the presumption against preemption has any application here.

In nevertheless finding that Texas cannot access its share of Subbasin 5 water in any other State, the court of appeals did not believe its approach compelled by the Compact language. Instead, it regarded the Compact as ambiguous, acknowledging that "[i]t may be possible to identify a different interpretation" of the Compact's "equal rights" language "so that it conflicts with the Oklahoma state water laws." Pet. App. 42a-43a. But, the court reasoned, the Compact's "pronounced deference to, not displacement of, state water laws" in Sections 2.01 and 2.10(a) (*id.* at 35a, 41a), together with "the presumption against preemption" (*id.* at 41a), weighed against such an interpretation. That analysis is wrong on its own terms, wholly apart from its inconsistency with the Compact's plain text.

1. In the Tenth Circuit's view, the Compact's boilerplate language concerning deference to state

water law "is evidence of Congress's consent to, not preemption of, state water regulations." Pet. App. 35a. The court found two provisions in particular "to caution against reading preemption into the Compact's other provisions" (*ibid.*): Section 2.01, which provides that "[e]ach state may freely administer water rights and uses in accordance with the laws of that state" (1JA10); and Section 2.10(a), which provides that "[n]othing in this Compact shall be deemed" to "[i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water" (1JA12). Those provisions, the Tenth Circuit explained, "call for pronounced deference to, not displacement of, state water laws." Pet. App. 41a.

That conclusion gets matters backwards. In discussing Sections 2.01 and 2.10(a), the court of appeals disregarded two crucial caveats: Section 2.01 says plainly that a State's authority to regulate water rights and uses "*shall be subject to the availability of water in accordance with the apportionments made by this Compact*" (1JA10 (emphasis added)); and Section 2.10(a)'s non-interference language similarly preserves only those state laws that are "*not inconsistent with [the signatory States'] obligations under this Compact*" (1JA12 (emphasis added)).

Those conditions make all the difference. Oklahoma's invocation of Sections 2.01 and 2.10(a) simply begs the question whether enforcement of the embargo would conflict with "the apportionments made by this Compact" (§ 2.01) or Oklahoma's "obligations under this Compact" (§ 2.10(a)). Tarrant has argued all along that the embargo *does* conflict with the Compact's apportionment of Subbasin 5 water and Oklahoma's obligation under the Compact to allow

Tarrant to enter Oklahoma to access Texas's share. The Compact's free-administration and non-interference provisions, qualified as they are, do nothing to suggest that courts should disfavor finding such conflicts when they genuinely arise.

Remarkably, the Tenth Circuit recognized all of this, noting that the Compact's "qualifi[cation]" of Section 2.10(a) simply "begs the question of how § 5.05(b)(1) should be read." Pet. App. 42a. That is exactly right. But the court of appeals failed to take the next step by acknowledging that Sections 2.01 and 2.10(a) therefore *have no bearing whatever* on the question whether Oklahoma's water embargo is preempted by the Compact. That was error.

2. The Tenth Circuit found substantial support for its reading of the Compact's terms not only in Sections 2.01 and 2.10(a), but also in the presumption against preemption. Pet. App. 34a, 40a-43a. In the court's view, this case implicates a "field" of law "in which Congress has legislated," but "which the States have traditionally occupied"; thus, any preemption analysis must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 34a. And the court of appeals thought this presumption to be "particularly strong in this case because history reveals 'the consistent thread of purposeful and continued deference to state water law by Congress.'" *Id.* at 34a-35a.

The error in that approach is also obvious. The presumption against preemption derives from "respect for the States as independent sovereigns in our federal system" and "assume[s] that 'Congress does not cavalierly pre-empt'" state law. *Wyeth* v. *Levine*,

555 U.S. 555, 565 n.3 (2009). But unlike a typical federal statute or regulation, an interstate compact is not imposed on the States by Congress. It is, instead, the product of two or more States exercising their sovereign prerogative to negotiate a collaborative solution to a common problem. Finding that congressional approval of such an agreement displaces contrary state laws does not derogate state sovereignty; it respects it. As the United States explained in its certiorari-stage brief (at 12), it is precisely the point of interstate compacts that they "embod[y] a number of compromises and mutual concessions of rights and authority that the respective States might otherwise claim." Respect for *those* compromises requires enforcing the plain language of interstate compacts as agreed to by the States themselves, without the distorting influence of a presumption against preemption.

D. Extrinsic evidence demonstrates that the drafters intended for Texas to access Subbasin 5 water within Oklahoma.

The touchstone in any compact interpretation case is "the intent of the compacting parties." *New Jersey*, 523 U.S. at 810. See also *Montana*, 131 S. Ct. at 1771 n.4 (courts must "interpret [a] Compact according to the intent of the parties"). Here, the Compact's plain text unambiguously expresses the signatory States' intent to authorize Texas water users to enter Oklahoma to obtain Texas's equal share of Reach II, Subbasin 5 water. But if there were any doubt on that score, it would be "appropriate to look to extrinsic evidence of the negotiation history of the Compact in order to interpret" compact terms that are "ambiguous." *Oklahoma* v. *New Mexico*, 501 U.S. 221, 235 n.5 (1991). That evidence shows clearly that

the Compact means what it says: Each State is entitled to an equal share of *all* Subbasin 5 water.

1. To begin with, the Court may be "aided in [its] interpretation [of the Compact] by considering * * * predecessor" drafts and comparing them with the "language [that] was [actually] adopted." *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 542 (2001). As a general matter, when the drafters of a document "decline[] to insert" language "despite having at one time considered doing so," the omission is deemed to reflect a deliberate judgment not to include the rejected language. *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364, 374 (2008).

Here, the Compact's drafting history demonstrates that the States considered, and rejected, limiting access to Reach II, Subbasin 5 water by state lines. The February 1966 draft, for example, allocated "[u]nassigned" Reach II water (which in later drafts would be defined as excess Subbasin 5 water) according to state borders: It gave (1) Oklahoma "the unrestricted right to divert and use" 50% of the Little River "*in that State*"; (2) Arkansas "the unrestricted right to divert and use" the Little River "*in Arkansas* above Millwood Dam"; and (3) Texas the "the unrestricted right to divert and use" the Sulfur River "*in Texas*." Approved Draft of the Red River Compact at 15 (Feb. 21, 1966) (emphasis added).[10] It also provided that certain percentages of Reach II water in excess of a 400 CFS downstream flow "may be diverted and used [by Oklahoma and Texas] *in their respective States*." *Ibid.* (emphasis added).

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[10] Petitioner has sought leave to lodge the 1966 draft of the Compact with the Clerk.

But the "in their respective States" language did not survive the negotiation process. It was stricken from the agreement by late 1975 (2JA224-249), and, of course, it is nowhere to be seen in the version of Section 5.05(b)(1) that was finally agreed to by the States and approved by Congress. See 1JA25. That "strongly militates against a judgment that [the States] intended a result" that they actively considered and "expressly declined to enact." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974).

2. Other aspects of the Compact history indicate that the drafters assumed that signatory States would have cross-boundary access to water within Subbasin 5. In one instance, Oklahoma's representative at the April 1965 Compact Commission meeting observed, in discussing the excess "free water" from the main channel of the Red River, that "Texas could come clear down to the Louisiana line to pick up their water." 2JA47. The "Louisiana line" on the Red River is shared with Arkansas, well past Texas's own border with that State. Consistent with the view that Texas could take its share of excess water outside its own borders, an Oklahoma engineer at the same meeting contemplated that Texas could "retain" or "deplete" an equal share of the "free water releases" from "the Boggy and the Kiamichi *in Oklahoma*." 2JA71 (emphasis added). And a Texas engineer later observed that Texas could take its share of water "below existing Federal reservoirs" at "Millwood and Texarkana." 2JA73. Millwood Dam is at the division point for Subbasin 5 in Arkansas; for Texas to take water below Millwood, it necessarily would have to enter Arkansas. See App., *infra* (map). Yet no objections to that observation were noted in the minutes.

3. It is clear the drafters understood that the percentage-based allocations of the "excess" water in Reach II referred, not to a percentage of the water within the States' respective lines (as the Tenth Circuit seemed to conclude), but to a percentage of the *entire* amount of excess water above the minimum flow, *regardless* of state lines. At the conclusion of the April 1965 meeting, the commissioners agreed that the allocations of excess Subbasin 5 water would "be stated as a percentage *for* each state," not a percentage of such water *in* each State. 2JA86-87 (emphasis added). Consistent with that view, the 1983 engineering worksheet states that "[e]ach State's Entitlement [to Subbasin 5 water] equals 25% of the algebraic sum of" the total of *all* the States' runoff and undesignated flow "minus 3,000 CFS." Engineering Advisory Committee Worksheet at 2 (Aug. 3, 1983) (emphasis added).[11]

Other evidence shows that the drafters were well aware that Texas would not be able to access a 25% allocation of the entire flow over 3,000 CFS within its own borders. A 1970 engineering report submitted to the Compact's negotiating commission establishes that, at the time of the drafting, a majority of the water flowing into Subbasin 5 was located in Oklahoma; far less than 25% was located in Texas. See *supra*, at 9 n.5. There accordingly is no denying that the drafters understood that cross-border transfers would be necessary for Texas to access its full share.

4. Finally, legislation authorizing federal reservoirs in Oklahoma within Reach II, Subbasin 1

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[11] Petitioner has sought leave to lodge the 1983 worksheet, which was prepared by the Engineering Committee to the Red River Compact Commission, with the Clerk.

enacted during the Compact negotiations provides further, and related, support for the conclusion that Texas may obtain water from Oklahoma.

Subbasin 1 is located wholly in Oklahoma and Oklahoma is granted unrestricted use of water in that subbasin. Nevertheless, as we have observed (at 11-12), the reservoir projects in Subbasin 1 *in Oklahoma* were approved as sources of water *for Texas*. At the time that the Hugo, Sardis, and Tuskahoma federal reservoirs along the Kiamichi River in Subbasin 1 were under consideration, Oklahoma's anticipated future water demands did not justify the cost of their construction. Thus, at the same time that the signatory States were negotiating the terms of the Red River Compact, Oklahoma legislators represented to the Army Corps of Engineers that the demands of north Texas (and specifically the Dallas-Fort Worth metropolitan area) should be taken into account to justify Congress's authorization and subsequent funding of the projects. See *supra*, at 12.

The Corps recommended to Congress that the projects be approved on precisely that basis: to meet anticipated future demand throughout "the central Oklahoma-north Texas region," expressly including the metropolitan area served by Tarrant. 1JA108. Congress approved that recommendation in the Flood Control Act of 1962, Pub. L. No. 87-874, tit. II, 76 Stat. 1173. The Compact's drafters would have regarded those expectations as binding: A federal reservoir project will not be authorized unless its benefits, including "present or anticipated future demand or need for municipal" water, exceed its costs (43 U.S.C. § 390b(b)); and when a project is authorized for multiple purposes, the cost-benefit analysis must "be determined on the basis that all authorized pur-

poses served by the project shall share equitably in the benefits of multiple purpose construction." *Ibid.*[12]

This history, as well as the restrictive scope of Subbasin 1, strongly supports our view that "the intent of the compacting parties" (*New Jersey*, 523 U.S. at 810) was to permit Texas to obtain its share of the water generated by the Oklahoma reservoirs out of *Subbasin 5* water in Oklahoma. The drafters would have understood that there would have been no way for Texas users, whose interests were essential to securing funding for the Hugo, Sardis, and Tuskahoma federal reservoirs in the first place, otherwise to benefit from those reservoirs. Because the water of Subbasin 1 is "apportioned" to Oklahoma, which enjoys "unrestricted use thereof" (1JA22 (§ 5.01(b))), the drafters could not have expected Texas users to divert undesignated water released from the federal reservoirs along the Kiamichi River in Subbasin 1. The drafters thus necessarily intended Texas to benefit from those federal projects by accessing the water that flowed downstream from the reservoirs along the Kiamichi River into Subbasin 5.

* * *

Against this legal and historical backdrop, there is no question that Tarrant is authorized by Section 5.05(b)(1) to enter Oklahoma to access Texas's apportioned equal share of Subbasin 5 water in that State.

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[12] The Compact drafters were keenly aware of those considerations. As Major General Ellsworth Davis of the Army Corps of Engineers admonished the States' representatives at the 34th meeting of the Compact Commission, the States had "no alternative but to obey—to conform to the Federal purposes for which the reservoir[s] [were] built" and could not "get[] away with changing the Federally-authorized purposes of a Federal project." 2JA51.

And because Oklahoma's discriminatory permitting scheme "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Compact, it is "preempted." *AT&T Mobility*, 131 S. Ct. at 1753.

II. OKLAHOMA'S DISCRIMINATORY WATER PERMITTING SCHEME VIOLATES THE DORMANT COMMERCE CLAUSE.

Even if this Court were to disagree with our reading of the Red River Compact and instead adopt the Tenth Circuit's or respondents' interpretation, the judgment below still could not stand. Under the Tenth Circuit's approach, a substantial amount of Reach II, Subbasin 5 water located in Oklahoma is not apportioned to *any* State and therefore is available to permit applicants like Tarrant.[13] As to that water, traditional dormant Commerce Clause principles undoubtedly apply.

A. The Red River Compact does not manifest unmistakably clear congressional intent to permit interstate discrimination.

1. Under the Commerce Clause, a "challenged law [that] discriminates against interstate com-

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[13] As we have noted, the Tenth Circuit and respondents read Section 5.05(b)(1) to apportion to each State up to 25% of the excess Subbasin 5 water located within the State's boundaries, or all the excess water located within the State's boundaries up to 25% of the total excess throughout the subbasin. Because a majority of Subbasin 5 water is located in Oklahoma, either reading means that a substantial amount the water located in Oklahoma is unallocated. This case presents no question regarding water that actually *is* allocated to Oklahoma, which Tarrant does not seek to appropriate in the underlying petition at issue here.

merce" for the "forbidden purpose" of favoring local interests over foreign ones "is virtually *per se* invalid." *Dep't of Rev. of Ky.* v. *Davis*, 553 U.S. 328, 338 (2008). And although Congress may expressly permit the States to discriminate against interstate commerce, it "must manifest its unambiguous intent before a federal statute will be read to permit" discriminatory state laws that otherwise would conflict with the negative implications of the Commerce Clause. *Wyoming* v. *Oklahoma*, 502 U.S. 437, 458 (1992). Such intent is most often "expressly stated" (*Sporhase* v. *Neb. ex rel. Douglas*, 458 U.S. 941, 960 (1982)) and, in all events, "must be *unmistakably clear*" (*South-Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 91 (1984) (emphasis added)).

This principle applies with full force to cross-border water disputes. Thus, in *Sporhase* the Court struck down on Commerce Clause grounds "a Nebraska statutory restriction on the withdrawal of ground water" that was substantially similar to the restriction on surface water at issue here: It prohibited, without a proper permit, the extraction of water for the purpose of transporting it across state lines for use in another State. 458 U.S. at 943-944. The permitting scheme "operate[d] as an explicit barrier to commerce" in water between Nebraska and its adjoining States. *Id.* at 957. Nebraska defended its law by pointing to dozens of broadly applicable federal water statutes and "a number of interstate compacts dealing with water that have been approved by Congress," which it argued to show that Congress "authorized the States to impose otherwise impermissible burdens on interstate commerce in ground water." *Id.* at 958.

But the Court rejected Nebraska's argument that such broad statutory language represented authorization "to impose otherwise impermissible burdens on interstate commerce in ground water." *Sporhase*, 458 U.S. at 958. "Although the 37 statutes and the interstate compacts demonstrate Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional constraints on such state laws." *Id.* at 959-960. To the contrary, the Court explained, "[t]he negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred." *Id.* at 960. The cited statutes and interstate compacts accordingly did not "constitute[] persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce" and "do not indicate that Congress wished to remove federal constitutional constraints on such state laws." *Id.* at 959-960.

2.a. The Tenth Circuit's decision below cannot be squared with that principle. In the court's view, four provisions of the Red River Compact manifest unmistakably clear congressional approval of Oklahoma's water embargo:

- Section 1.01(a), which says that a "principal purpose[] of this Compact" is to "govern[] the use, control and distribution of the interstate water of the Red River and its tributaries";
- Section 2.01, which says that each State "may use the water allocated to it by this Compact in any manner deemed beneficial by that state" and "may freely administer water rights and uses in accordance with the laws of that state, * * * subject to the availability of water

in accordance with the apportionments made by this Compact";

- Section 2.10(a), which says that "[n]othing in this Compact shall be deemed to * * * [i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, not inconsistent with its obligations under this Compact"; and
- the general language of Section 5.05, which, in the Tenth Circuit's view, "confers authority to the states to regulate water use within their respective boundaries" (Pet. App. 26a).

On the face of it, none of that language comes close to the sort of unmistakably clear congressional statement necessary to insulate Oklahoma's water embargo from Commerce Clause challenge.[14]

Section 1.01(a) (1JA9), which comprises the Compact's preamble, merely recognizes that the Compact's "purpose" is "to govern the 'use, control and distribution' of the compacted water." Pet. App. 27a. Nothing in that perfunctory language alludes to the Commerce Clause or state discrimination at all, let alone remotely "indicates [Congress's] consideration [and] desire to alter the limits of state power

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[14] The court also pointed to Section 4.02(b), which grants Oklahoma "free and unrestricted use" of the water of Reach I, Subbasin 2 (1JA19). Tarrant does not press before this Court any claim to appropriate water from Reach I, Subbasin 2. Needless to say, the Compact's "free and unrestricted use" language relating to *other* subbasins cannot reflect a congressional intent to waive Commerce Clause restrictions that apply to Subbasin 5.

otherwise imposed by the Commerce Clause." *Public Util. Comm'n*, 345 U.S. at 304.

Sections 2.01 and 2.10(a) (1JA10, 12) do not strengthen respondents' case. Each simply expresses generic deference to state water law. This Court has said repeatedly that "deference to state water law" does not "indicate that Congress wished to remove federal constitutional constraints on such state laws"; instead, that language must be understood as deferring only to "*valid* state law," an "ingredient[]" of which is conformity with "[t]he negative implications of the Commerce Clause." *Sporhase*, 458 U.S. at 959-960.[15] See also *Wyoming*, 502 U.S. at 458 (similar). Such language "does not "constitute[] persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on Commerce." *Sporhase*, 458 U.S. at 960.

And Section 5.05 (1JA24-26) does not fill the gap. As we have explained, 5.05(b)(1) unambiguously allocates the excess water of Subbasin 5 without respect to state boundaries and has nothing to do with waiving Commerce Clause restrictions. The Tenth Circuit—although ultimately rejecting that understanding of the language—acknowledged that our reading of Section 5.05 was a "possible" one. Pet. App. 43a. The court nevertheless thought that the ambiguity it perceived in Section 5.05 made the dor-

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[15] The Tenth Circuit attempted to distinguish *Sporhase* on the ground that the water at issue there was not itself covered by an interstate compact containing the deference-to-state-law language. Pet. App. 27a. But the court offered no explanation why that observation has any bearing on whether Congress, in approving the Red River Compact, expressed a clear intent to displace the dormant Commerce Clause.

mant Commerce Clause question "more complex." Pet. App. 26a. But, in fact, that ambiguity (if it existed) would itself answer the Commerce Clause question: Ambiguous statutory terms *cannot* be "unmistakably clear." *Wunnicke*, 467 U.S. at 91.

b. Perhaps recognizing that Sections 1.01(a), 2.01, 2.10(a), and 5.05 do not suffice to express clear congressional consent taken alone, the Tenth Circuit read those provisions "[t]aken together," and with "the Compact as a whole," to "echo[] and reinforce" the notion that the States have "broad regulatory authority" over apportioned water, which the court believed consistent with congressional permission to discriminate. Pet. App. 25a, 27a. But that is precisely the kind of gestalt approach that this Court's holdings forbid. As the Court explained in *Wunnicke*, "[t]he fact that the state policy * * * appears to be consistent with federal policy—or even that state policy furthers the goals we might believe that Congress had in mind—is an insufficient idicium of congressional intent." 467 U.S. at 92. And it is fundamental that when Congress has not stated an unmistakably clear intent "to sustain state legislation from attack under the Commerce Clause, [the courts] have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.'" *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982) (citing *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427, 431 (1946)). Yet in relying on the vague notion that the Compact confers "broad legislative authority" over apportioned water, that is precisely what the Tenth Circuit did.

3. The Tenth Circuit committed one final error in its treatment of the Commerce Clause question: It relied on extra-textual material—the Compact's in-

terpretive comments—to infer congressional intent from text that the court of appeals acknowledged is *not* unmistakably clear in its own right. The court admitted that some Compact language "might suggest no more than preservation of existing state laws without protecting them from dormant Commerce Clause attack," but found that "the Compact's Interpretive Comments refute [that] suggestion" and "confirm" that Congress gave supposedly clear consent to Oklahoma's discriminatory water-permitting scheme. Pet. App. 25a. The court's resort to the interpretive comments was misguided for two reasons.

First, that the court felt it necessary to consult the interpretive comments at all to determine the meaning of the Compact's text necessarily demonstrates that the text is *not* unmistakably clear. As the Court has said in other clear-statement-rule contexts, extra-textual material like "[a] statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text; the unequivocal expression of [congressional intent] that we insist upon is an expression *in the statutory text*." *Lane* v. *Pena*, 518 U.S. 187, 192 (1996) (emphasis added) (waiver of the United States' sovereign immunity). Accordingly, "[i]f Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; [and] if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the [clear statement] rule" will "not be met." *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989) (waiver of Eleventh Amendment immunity).

Just so here. If Congress's consent to Oklahoma's discriminatory permitting scheme were unmistakably clear, recourse to the interpretive comments

would be unnecessary; if its consent were *not* unmistakably clear (as the Tenth Circuit appears to have acknowledged), recourse to the interpretive comments would be futile. See *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383 (1994) (O'Connor, J., concurring) ("isolated references" in the legislative history "do not satisfy [the Court's] requirement of an explicit statutory authorization" to depart from the dormant Commerce Clause). Thus, when the court of appeals recognized that some Compact language "might suggest no more than preservation of existing state laws without protecting them from dormant Commerce Clause attack" (Pet. App. 25a), that should have been an end to the matter—language susceptible to more than one interpretation cannot be "unmistakably clear."

Second, the court's reliance on the interpretive comments is wrong on its own terms. According to the Tenth Circuit, the comments declare that "each state is free to continue its existing internal water administration, or modify it in any manner it deems appropriate"; some of the discriminatory Oklahoma statutes "predate the signing and ratification of the Compact and would have been familiar to the Compact's drafters"; and "[a]ccordingly, when Congress ratified the Compact and granted to each state the power to 'freely administer' the water, it gave congressional consent to the [pre-water-embargo] statutes at issue here." Pet. App. 25a-26a. But even assuming that Congress had been aware of the interpretive comments' statement that each signatory State could continue its existing regulations, it again would have regarded "[t]he negative implications of the Commerce Clause" to be "ingredients of the *valid* state law to which [it] had deferred." *Sporhase*, 458

U.S. at 960. Nothing here authorizes the blatant state discrimination reflected in Oklahoma's laws

B. Oklahoma's water permit scheme discriminates for the purpose of discrimination.

Without the benefit of a clear statement from Congress authorizing Oklahoma to discriminate against out-of-state water users, Oklahoma's permitting scheme violates the dormant Commerce Clause. Oklahoma's discriminatory permitting scheme effectively prohibits the appropriation of surface water in Oklahoma for use in another State—which is, of course, precisely what it was designed to do. OWRB is legally obligated to reject Tarrant's application under the Oklahoma Attorney General's opinion (Pet. App. 97a) and Oklahoma Statutes, title 82, section 1086.2. Even if Tarrant were issued a permit, the full annual amount of water allocated by the permit would have to be put to use within seven years (Okla. Stat. tit. 82, § 105.16) and would be subject to divestiture at any time (*id.* § 105.12(F)), impractical conditions not applicable to in-state water permit-holders. Beyond that, Oklahoma law expressly favors in-state water users, whose interests get top priority under Oklahoma Statutes, title 82, sections 105.12 and 105.16.

Oklahoma's water permitting scheme thus "discriminates against interstate commerce" for the "forbidden purpose" of favoring local interests over foreign ones; it is "*per se* invalid" and should be declared unenforceable. *Davis*, 553 U.S. at 338.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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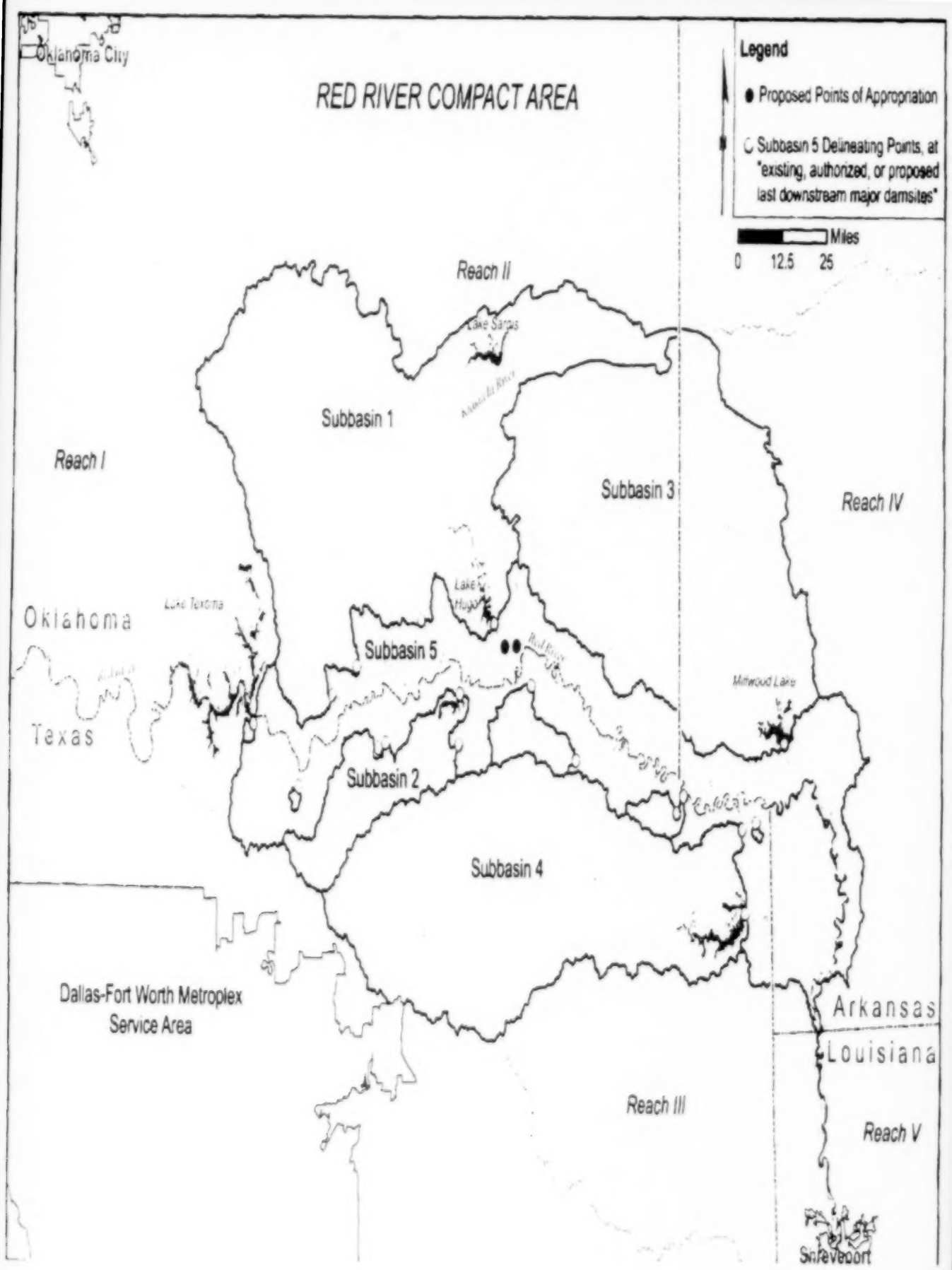
APPENDIX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Dallas-Fort Worth Metroplex Service Area
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Louisiana
Reach III
Reach V
Shreveport

RESPONDENT'S BRIEF

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No. 11-889

IN THE

Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
Petitioner,

v.

RUDOLF JOHN HERRMANN, *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTIONS PRESENTED

1. Whether the Red River Compact—which allocates to each Signatory State "equal rights to the use" of no "more than 25 percent" of flows in Reach II, Subbasin 5 "in excess of 3,000 cubic feet per second"—gave the Signatory States the right to divert a fixed, equal share of Subbasin 5 waters from within another State's borders.

2. Whether the dormant Commerce Clause bars Oklahoma from applying its water laws when Oklahoma decides whether to grant an applicant an initial appropriative right to water governed by the Red River Compact.

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STATEMENT

Few truths in our national experience have been more self-evident than that States do not relinquish core sovereign prerogatives quietly. States do not silently authorize a neighboring State to invade their territory and extract water from within their borders. When States grant each other cross-border rights in an interstate compact, they say so expressly and clearly articulate the scope of such rights. They do so to protect their sovereign powers from being trampled, and to prevent a jurisdictional nightmare in which States war over how such rights should be exercised and regulated.

In 2007, Tarrant, one of Texas's 39 water districts, sought from Oklahoma the permanent right to take over 100 billion gallons of water annually from the Kiamichi River, Oklahoma's most ecologically significant waterway. Though framed as a request, Tarrant's simultaneous lawsuit alleged that Oklahoma has no choice in the matter, because §5.05(b)(1) of the Red River Compact authorizes Texas to take a 25% share of certain flows from *any* State's waters within Subbasin 5, an interstate basin that encompasses part of the Kiamichi. Map 1, *infra*.

This was news to Oklahoma. The Compact's text, Interpretive Comments, and compliance rules do not mention a cross-border fight. Like the other Signatory States, Oklahoma has long understood §5.05(b)(1) as a never-invoked check on States that divert Subbasin 5 water excessively. Oklahoma, Texas, Arkansas, and Louisiana spent two decades

negotiating the Compact and three decades operating under it without mentioning a cross-border right. If Texas thought it could take desirable streamwater from other States for free, Texas might have mentioned that right in its water plans. Certainly, Texas might have alerted Tarrant before Tarrant and other state agencies offered Oklahoma over one billion dollars to *buy* the same water they now claim by right. And if Texas believed it was not receiving Texas's full allocation of compacted waters, Texas might have called for an accounting or complained to the Compact Commission. It might at least have advised the district court, the Tenth Circuit, and this Court of its view of the Compact's negotiating history and of how much Subbasin 5 water Texas currently receives. Given the total absence of any discussions, reliance on, or even mention of an unprecedented cross-border right, Texas's curious silence speaks volumes.

A. The Red River

The Red begins in New Mexico, winds east through the Texas Panhandle, and emerges as the Oklahoma-Texas border.[1] From the western edge of that border to Lake Texoma, water is salty, rainfall is scant, and the Red often runs dry. M. A. Chapman, *Where East Meets West in Water Law: The Formulation of an Interstate Compact to Address the Diverse Problems of the Red River Basin*, 38 Okla. L. Rev. 1, 5-7 (1985). Under the Compact, these waters are within Reach I. §§4.01-4.03; Map 2, *infra*.

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[1] Until 2000, the Oklahoma-Texas border was the south bank; it is now the southern vegetation line. *Compare* Red River Boundary Compact, 114 Stat. 919 (2000), *with Texas v. Oklahoma*, 457 U.S. 172, 172 (1982).

At Lake Texoma—one of the country's largest reservoirs—Denison Dam impounds the mainstem. The southernmost portions of the lake extend into Texas. These waters also are in Reach I. §4.04; Map 2. Although somewhat saline, Lake Texoma's waters are suitable for municipal supply. Texas water districts, including *amicus* North Texas Municipal Water District, use these waters as drinking water. North Texas Municipal Water District, *2011 Region C Water Plan* 4E.25, http://tinyurl.com/NTMWD-Texoma; U.S. Br. 26. Lake Texoma's waters are so valued that the District just announced a $300 million project to deliver even more Lake Texoma water to the Dallas/Fort Worth area. *NTMWD News Release* (Dec. 28, 2012), http://tinyurl.com/NTMWD Pipeline.

From Denison Dam, the Red forms the Oklahoma-Texas border for another 200 miles.[2] The surrounding waters are in Reach II, and the mainstem and portions of tributaries flowing into it are in Subbasin 5. §5.05; Map 1. Among the Oklahoma tributaries flowing into the Red below Denison Dam is the Kiamichi River, which is home to endangered species and is used for recreation. The Nature Conservancy, *Rivers of Life: Critical Watersheds for Protecting Freshwater Biodiversity* 36-37 (1998); U.S. Army Corps of Engineers (Tulsa District), *Hugo Lake Recreation*, http://tinyurl.com/HugoLake. Far from constituting

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[2] Tarrant describes this stretch as "not a suitable source of potable water." Pet. Br. 6. But the source Tarrant cites describes waters upstream and *west* of Lake Texoma, *i.e.*, in Reach I. Chapman, *supra*, at 7; Maps 1 & 2. The waters *east* of Lake Texoma—in Reach II—are "generally . . . good to excellent," and of higher quality than the Lake Texoma waters North Texan water districts use as a municipal source. Chapman, at 7.

dry arroyos, Texas considers *Texas*-side freshwater streams here usable as a public water supply.[3]

Just north of DeKalb, Texas, Oklahoma ends and Arkansas begins. For about fifty miles, the Red marks the border between Texas and Arkansas. Here, too, Texas has deemed *Texas* streams usable as public water sources.[4] The mainstem and portions of tributaries flowing into it are in Subbasin 5. §5.05; Map 1.

Texas's border stops at Index, Arkansas. The Red then cuts through Arkansas, crosses into Louisiana, and empties into the Atchafalaya and Mississippi Rivers. Maps 1 & 2. The mainstem and portions of tributaries from the Texas-Arkansas border to the Arkansas-Louisiana border are in Subbasin 5. §5.05; Map 1. Several Texas tributaries are in this part of Subbasin 5 and empty into Arkansas. They include waters downstream of Texarkana Lake, part of a basin which receives "the largest average watershed yield" in Texas and provides "an important source of surface water supply." Texas Water Dev. Bd., *Water for Texas 2007* 156 (2007), http://tinyurl.com/TXWater07-6.

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[3] Texas Comm'n on Envtl. Quality, *2004 Texas Water Quality Inventory: Red River Below Lake Texoma, Segment 0202 Fact Sheet*, http://tinyurl.com/TCEQ-04WaterQuality; Texas Comm'n on Envtl. Quality, *Basin 02: Red River* 47, 52 (2000), http://tinyurl.com/TCEQ-RRBasin.

[4] Texas Comm'n on Envtl. Quality, *2004 Texas Water Quality Inventory: Lower Red River, Segment 0201 Fact Sheet*, http://tinyurl.com/TCEQ-04WaterQuality.

B. The Compact's Origins

During the first half of the twentieth century, the Red was an untamed river prone to interstate disputes. When both Oklahoma and Texas claimed the riverbed in the 1920s, their competing assertions of jurisdiction nearly led to war. "[T]he militia of Texas had been called to support the orders of its courts, and an effort was being made to have the militia of Oklahoma called for a like purpose." *Oklahoma v. Texas*, 258 U.S. 574, 579-80 (1922). At midcentury, Oklahoma and Texas made limited use of the Red River Basin, while Arkansas and Louisiana explored future development. *Water Policy in Texas: Responding to the Rise of Scarcity* 150 (R. Griffin ed., 2011).

The 1950s brought unprecedented drought. *Id.*; K. McConnell, *Recent Dry Spell Compared To 'The' Drought*, Lawton Constitution, Jan. 6, 2013, http://tinyurl.com/okladryspell. Oklahoma and Texas sought to use the Red River Basin and wanted certainty as to their rights. Chapman, *supra*, at 62, 64. Downstream, Arkansas and Louisiana sought adequate mainstem flows. *Id.* at 61-65. In 1955, Congress authorized the States to negotiate a compact. 69 Stat. 654, 654 (1955).

In 1956, the Red River Compact Commission began dividing the basin and allocating waters. Hopes for a swift agreement were soon dashed, not least because streamflow data was elusive. Chapman, *supra*, at 74-75. Reaching final agreement would take 22 years.

C. Texas's Pursuit Of Out-Of-State Water

As Compact negotiations dragged on, Texas's water planners—often the very individuals representing Texas in negotiations—concluded that Dallas/Fort

Worth and other regions would soon run out of water. But Arkansas, Louisiana, and Oklahoma uniformly rejected the idea of selling Texas their water. Granting Texas the right to divert water for free was never even on the table.

1. Soon after Compact negotiations began, Dallas/Fort Worth officials sought Oklahoma's water. Congress had authorized the construction of Hugo Reservoir, on Oklahoma's Kiamichi River, as a flood control project. In 1956, when Congress debated authorizing additional funds, Dallas/Fort Worth officials offered to purchase additional storage space to enlarge Hugo Reservoir so that water could be piped into Texas. 1JA99-101 (legislative history). But Congress again authorized the project for flood control only. *See* 72 Stat. 297, 309 (1958).

The Dallas/Fort Worth proposal thereafter made little headway. When Congress reviewed appropriations in 1962, the Army Corps of Engineers noted that unlike Oklahoma City, Dallas/Fort Worth had sufficient supplies, and "the additional water supply needed there after the year 2000 could be obtained more advantageously from sources other than Kiamichi River projects." 1JA108-09. Congress never promised that additional water or reservoir space would be available for Dallas/Fort Worth—nor did Texas ever pay for it.

2. By the 1960s, Texas water planners anticipated serious future shortages. In 1968, planners announced that "presently available water resources are grossly inadequate to meet Texas's future economically justified water needs." Texas Water Dev. Bd., *The Texas Water Plan* 1-3, 12 (1968), http://tinyurl.com/TxWaterPlan68. "Importation of water from out-of-State sources will be essential,"

planners warned. *Id.* at 1. Successive governors identified *purchasing* out-of-state water as Texas's highest priority. L. Ruesink, *Water: Basin to Basin*, 4 Texas Water Res. No. 2, 3 (Mar. 1978), http://tinyurl.com/Basin-Basin.

During the final decade of the Compact's negotiation, Texas vigorously pursued out-of-state water. Yet no Texas entity identified the Compact as a way to secure out-of-state water rights. Quite the contrary: from 1968 to 1974, Texas planned to purchase billions of gallons of Mississippi River water from Louisiana. A Trans-Texas pipeline—described as "an aqueduct built to the dimensions of an airplane hangar"—would pump water from Louisiana, supply a "generous portion" to Dallas/Fort Worth, and move the rest to West Texas. M. Reisner, *Cadillac Desert: The American West and Its Disappearing Water* 444 (1986); *Texas Water Plan*, *supra*, at 3, 12-14. But Louisiana protested that these waters were needed in-state. As a federal official reflected when studying Texas's plan, "I felt like taking out a new life insurance policy before going into the bayous down there." Reisner, *supra*, at 447. Other obstacles—financial, environmental, and political—mounted. By 1976, all but the most committed Texas politicians acknowledged that a pipeline to the Mississippi was a pipe dream. *Id.*

Texas then sought to buy Arkansas's water, which Texas planned to channel through pipelines that would supply Dallas/Fort Worth, then stretch to the High Plains. Texas Water Dev. Bd., *An Assessment of Surface Water Supplies of Arkansas with Computations of Surplus Supplies and a Conceptual Plan for Import to Texas* 1-3, 31-34, 36-37 (1976),

http://tinyurl.com/ArkAssess; J. Gonzalez, *Water Accord Forecast*, Dallas Morning News, Jun. 20, 1982.

Arkansas did not welcome this plan. As a Texas report acknowledged, "Since the water resources of any state are a valuable commodity . . . the movement of water across state lines can be very controversial and a question of political dissension." *Assessment of Surface Water Supplies of Arkansas*, *supra*, at 10. That proved an understatement. The water Texas saw as "surplus" was water Arkansas might need and categorically refused to sell. A. Atterberry & G. Kuempel, *'Don't Let Texas Have Our Water,'* Dallas Morning News, Aug. 30, 1981. Still, Texas persisted. *Water Accord Forecast*, *supra*.

3. During the 1970s, Oklahoma officials worried that Texas would target Oklahoma's southeastern waters next—and were determined to nip such plans in the bud. The Oklahoma Water Resources Board's first state survey predicted future shortages in Oklahoma. *E.g.*, J. Holladay, *Future Water Shortages Seen*, The Oklahoman, Apr. 30, 1971. Until the 1990s, Oklahoma believed that in-state water sources might be sufficient—but only if Oklahoma built a giant pipeline diverting waters from the Kiamichi and other southeastern Oklahoma sources to Oklahoma's arid but bustling western cities. Okla. Water Res. Bd., *Update of the Oklahoma Comprehensive Water Plan 1995* 4-5 (1997), http://tinyurl.com/OWRB 1995; E. Montgomery, *Water Project Considered*, The Oklahoman, Aug. 26, 1979. Even if Oklahoma realized a surplus, officials worried that if other States purchased Oklahoma's water before Oklahoma's plans were finalized, out-of-state users could

impair Oklahoma's ability to meet its own future needs.[5]

Given Oklahoma's anticipated shortages, Oklahoma officials were adamant that Oklahoma had no water to spare. In 1975, Governor Boren expressed "concern[]" that "other states, particularly Texas, are having eyes on our water," and resolved to "keep our water in the state." *Eyes of Texas on Sooner Water*? Dallas Morning News, Sept. 10, 1975. The OWRB's planning chief warned that Oklahoma should be vigilant lest Texas seek Oklahoma water next. *We've Been Warned*, The Oklahoman, Nov. 10, 1976.

Oklahoma's fears of scarcity did not come to pass—but only because Oklahoma's growth abruptly halted when oil prices crashed in the 1980s. *Update of the Oklahoma Comprehensive Water Plan 1995*, *supra*, at 4-5. Until then, Oklahoma's policy was to safeguard its waters to preserve maximum flexibility as plans developed.

Against this backdrop, §5.05(b)(1) was negotiated and drafted.

D. Allocation Of Subbasin 5

Reach II had long stymied the Compact's drafters, but not because of any debate over one State's right to enter another to divert water. That issue was not even raised. To the contrary, drafts addressing Subbasin 5 allocations consistently assumed that borders applied.

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[5] *E.g.*, E. Montgomery, *Buffeted by Debate, Water Plan Faces More Waves*, The Oklahoman, Apr. 25, 1976; *Eyes on Our Water*, The Oklahoman, Nov. 21, 1974; *Senators Call for State Water Plan*, The Oklahoman, Feb. 14, 1974.

1. The initial challenge in allocating Reach II came from its geography. The Red's mainstem runs eastward through the center of Reach II, forming the borders between Oklahoma, Texas, and Arkansas. Reach II ends at the Arkansas-Louisiana border, and Louisiana wanted guarantees of sufficient flows when the mainstem entered Louisiana. Map 1; 1JA27 (Interpretive Comments). Because Louisiana had no reservoirs and therefore no way to store water for release during shortages, Louisiana sought reliable flows at all times. The other States already had dams and reservoirs upstream, however, and opposed plans that would require them to release reservoir water to satisfy Louisiana's downstream needs. 1JA27.

"As a solution to these opposing points of view," the Compact "divided [Reach II] into five subbasins." 1JA27. Four upstream subbasins were created using the last major downstream dam on each tributary as a cut-off point. 1JA27. The remainder—Subbasin 5—included the mainstem and lower portions of tributaries, "from Denison Dam down to the Arkansas-Louisiana state boundary." §5.05(a); Map 1.

Ensuing negotiations over Subbasin 5 centered on how best to ensure Louisiana adequate flow. *E.g.*, 2JA46-47, 185, 205 (assorted minutes). The eventual compromise was that "[w]henever the flow of the Red River at the Arkansas-Louisiana state boundary falls below 1,000 [cfs]," Arkansas, Oklahoma, and Texas let *all* undesignated water and runoff "within their respective states to flow into the Red River as required to maintain a 1,000 [cfs] flow" for Louisi-

ana.[6] §5.05(b)(3). If the flow is between 1,000 cfs and 3,000 cfs, Arkansas, Oklahoma, and Texas can keep 60% of all runoff and undesignated water within their borders, but must pass to Louisiana the other 40%. §5.05(b)(2).

Those provisions satisfied Louisiana. Arkansas sought assurance that if flows at the Texas-Arkansas border dropped, Arkansas would receive flows from Oklahoma and Texas. 1JA31 (Interpretive Comments). The other States acceded and added §5.05(c).

2. The drafters always understood that §5.05(b)(1), which allocates Subbasin 5 waters during higher flows, was a geographically-defined cap on withdrawals. A 1965 draft provided: "[T]he rate of removal of water by the State of Oklahoma or the State of Texas from the Red River, or that part of its tributary below a dam . . . on that tributary, between Denison Dam and the Arkansas-Oklahoma-Texas State Line shall not exceed the amount equal to [percentages for states to be developed] the rate of flow at the Arkansas-Oklahoma-Texas State Line in excess of 400 cfs." 2JA90. Similar caps along State borders applied to Arkansas's and Texas's diversions of water further down in Subbasin 5. 2JA90. A 1966 draft Tarrant lodges likewise assumed each State would

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[6] "Undesignated water" means "all water released from storage other than 'designated water.'" §3.01(*l*). "Designated water" means "water released from storage, paid for by non-Federal interests, for delivery to a specific point of use or diversion." §3.01(k). "Runoff" is "both the portion of precipitation which runs off the surface of a drainage area and that portion of the precipitation that enters the streams after passing through the portions of the earth." §3.01(n).

divert water from parts of Subbasin 5 within its borders. *1966 Draft Compact* 15-16.[7]

Borders did not disappear in 1970, despite the circulation of the Engineering Advisory Committee report Tarrant lodges. Pet. Br. 9 n.5. Instead, the engineers required additional data on how much water *originating in* Subbasin 5 each State received, and tasked Texas with running projections. 2JA128-29, 148-49 (1972 minutes).

While awaiting Texas's results, the engineers recommended that "Oklahoma, Texas, and Arkansas shall have free and unrestricted use of the waters of this sub-basin," subject to certain limitations. 2JA141 (1972 minutes). Neither Texas nor Oklahoma could divert water unless flows at the Oklahoma-Arkansas border exceeded 300 cfs, and neither Arkansas nor Texas could divert water unless flows at the Texas-Arkansas border exceeded 400 cfs. 2JA141. Once those flows were exceeded, the only limitation on Oklahoma, Texas, and Arkansas's "free and unrestricted use" was that Oklahoma and Texas had to allow "40 percent of the total weekly runoff originating in their respective states in the segment between Denison Dam and the Oklahoma-Arkansas state line in excess of the 300 cfs" to flow to Louisiana. 2JA141-42. Arkansas and Texas likewise had to send 40% of runoff within their States to Louisiana when flows exceeded 400 cfs. Each State had free and unrestricted use of the other 60% within their borders. 2JA141-42.

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[7] Tarrant mischaracterizes the 1966 draft as reflecting predecessor versions of §5.05(b)(1). Pet. Br. 42. The Little River in Oklahoma and Arkansas and the Sulphur River in Texas are in Subbasins 3 and 4, and the provisions referencing them are predecessor versions of §5.03 and §5.04, not §5.05(b)(1).

In late 1972, even after receiving Texas's projections of "the division of water among the four States that originates" in Subbasin 5, no one sought to change the allocations. No one even thought the data worth describing in the minutes. Nor did Texas complain that too little water flowed into Texas's portion of Subbasin 5. 2JA148-49 (1972 minutes).

As of mid-1973, drafts allocated excess Subbasin 5 water above certain flows by giving "Oklahoma, Texas and Arkansas . . . free and unrestricted use of the waters of this sub-basin." 2JA173. The engineers abandoned specific allocations: "Overall accounting and allocation of flows will not be required when the flow at the Arkansas-Louisiana state-line exceeds 3000 cfs." 2JA173. There was also no need to specify different flows at the Oklahoma-Arkansas line and the Arkansas-Louisiana line; data showed the flows at those points were similar. 1JA30-31 (Interpretive Comments). Granting the States "free and unrestricted use" of this water necessarily meant use *within their borders*; multiple States cannot have "free and unrestricted use" of the same water.

By summer 1974, the Compact's legal advisors had turned the engineers' proposal "into compact language," but kept the same language for Subbasin 5. 2JA184-85, 192 (1974 minutes). Texas considered Reach II negotiations "virtually complete" and "approved by the Commission." 2JA195 (1974 minutes). Texas's position was that Reach II was important to Texas's water planning only insofar as *Texas* tributaries within that reach would serve municipal needs. 2JA196-97. Texas's additional needs would be met through its plans to secure Mississippi River waters from Louisiana. 2JA196-97.

Echoing prior drafts, Texas's 1975 proposal allocated Subbasin 5 by giving Oklahoma, Texas, and Arkansas "free and unrestricted use of the waters of this subbasin so long as the flow of the Red River at the Arkansas-Louisiana state line is 3,000 [cfs] or more." *Draft Compact (Texas)* 15-16 (Nov. 6, 1975), http://tinyurl.com/TX75Draft.

In late 1975, the federal chairman of the Compact Commission, F.P. Koisch of the Corps, took the pen to expedite drafting. 2JA221 (1975 minutes). The new draft introduced what became the final phrasing of §5.05(b)(1). *1976 Draft Proposal for a Red River Compact* 17, http://tinyurl.com/1976Draft. For the first time, the Compact provided that when flows at the Arkansas-Louisiana border exceeded 3,000 cfs, Arkansas, Oklahoma, Texas and Louisiana would have "equal rights to the use of" runoff and undesignated waters in Subbasin 5, "provided no State is entitled to more than 25 percent of the water in excess of 3,000 [cfs]." *Id.*; *accord* §5.05(b)(1).

Those revisions—made as the OWRB's planning chief announced that Oklahoma would block Texan designs on Oklahoma's southeastern waters—fixed a flaw in earlier drafts. If Arkansas, Oklahoma, and Texas had "free and unrestricted use" of "excess" Subbasin 5 water, one or two States could disproportionate use the water above 3,000 cfs at the expense of the others. Allowing the States to call for an accounting and determine whether any one State was using a disproportionate amount of water solved that problem. 1JA29-30 (Interpretive Comments). In the ensuing discussions, States debated a number of issues about low flows. But §5.05(b)(1) was left unchanged. No State believed the new phrasing transformed Subbasin 5 into a borderless common.

3. Texas's lack of concern over the percentage of Subbasin 5 water within its borders was for good reason. Time and again, the drafters discussed "the percentage of the Red River watershed between Denison Dam and the Arkansas-Louisiana State line which lies within their respective states," and Texas contained 34% of the watershed. 2JA30, 35. While the drafters concluded that watershed percentages varied too much to be used to fix allocations, Texas's portion seemed substantial. 2JA135.

Moreover, Texas also secured major concessions on many of the subbasins feeding into Subbasin 5. Though "Oklahoma contributes significantly more than 50% of the inflow" to all mainstem waters (including Lake Texoma) in Reach I, Texas and Oklahoma split these waters equally. 1JA20 (Interpretive Comments). Texas thereby won the right to divert enormous quantities of water—and to control how much flowed over into Subbasin 5. 1JA20. Texas also received free and unrestricted use of all Reach II, Subbasin 2 *and* Subbasin 4 waters. §§5.02, 5.04; Map 2.

E. Ratification

1. In 1978, the Compact was finalized and the States were ready for ratification. Oklahoma's understanding of the Compact was clear: Texas was not getting any water in Oklahoma. As Oklahoma legislators understood the Compact, the allocation of "waters of Oklahoma within Reach II" involved a grant of "unrestricted use of the portion of those streams wholly within the state above their last major downstream dam site[.]" *Synopsis of H.B. 1388,*

Red River Compact (Mar. 8, 1979), http://tinyurl.com/HB1388. Oklahoma's understanding of §5.05(b)(1) was that "Oklahoma has unrestricted use of the Red River below Denison Dam and its tributary areas below major dam sites, provided that the flow of the Red River at the Arkansas-Louisiana state boundary is more than 3,000 [cfs]." *Id.* Oklahoma—as well as Arkansas and Louisiana—never contemplated that decades later, a Texas subdivision would claim a right to enter Oklahoma and siphon billions of gallons of Oklahoma's water.

2. Texas's conduct after signing the Compact was consistent with Oklahoma, Arkansas, and Louisiana's understanding. Texas reiterated its interest in purchasing out-of-state water. Texas's governor announced, "[I]f Texas ran out of water it could buy what it needed from Arkansas." *'Don't Let Texas Have Our Water,' supra* (describing 1980 remarks). Meanwhile, Tarrant announced plans to supply Fort Worth by building a "whopper" of a Texan lake "even by Texas standards." *Proposed Lake Would Be a Whopper*, Dallas Morning News, Jan. 14, 1979.

Yet again, Texas's overtures prompted emphatic rejections. Oklahoma officials reiterated, "The state is not interested in exporting water." *Water Project Considered*, *supra*. In Arkansas, Texas's remarks "set off an uproar that promises to continue through the decade." *'Don't Let Texas Have Our Water,' supra*. In December 1980, when Congress approved the Compact, 94 Stat. 3305 (1980), the controversy still raged. The only cross-border transfer Arkansas ultimately allowed was the half-gallon of water Arkansas's governor sent to Texas's governor with the note, "This is all you're going to get." T. Palmer, *Endangered Rivers and the Conservation Movement*

206 (2d ed. 2004); *Clements Calls Water Ban 'Crazy,'* Dallas Morning News, Jun. 11, 1982.

F. Post-Ratification Interpretation

In 1987, the Compact Commission adopted interim compliance rules for §5.05 under the assumption that §5.05(b)(1) would not require regular accounting. 1JA55 (Rule 5(a)(4)); *Report of the Red River Compact Comm'n 2011*, 162 (Jun. 2012), http://tinyurl.com/RRCC2011. The rules apply only if a State demands an accounting, at which point the Engineering Advisory Committee "will determine compliance with [the] Compact." 1JA53 (Rule 2(a)(1)(b)). The engineers are to do so by looking to the Hosston Gage below the Arkansas-Louisiana border to determine if flows exceeded 3,000 cfs. They then calculate the total amount of Subbasin 5 water and assess whether any State used more than 25% of any "excess" flows. 1JA63 (Rules 6(d)(2)(a) & 7).

The rules say nothing about the existence of a cross-border right, let alone how it might be administered. Instead, the rules provide, "Each State will be responsible for insuring that the sum of the diversions by State users does not exceed the total State diversion authorized by the . . . Compact," and that "each State will be responsible for establishing clear legal authority *within its State* for enforcing the restrictions imposed" by the Compact. 1JA54 (Rule 3) (emphasis added). The rules thus assume that States will monitor their own allocations within their borders.

Texas's proposed in-state §5.05 compliance rules confirmed that Texas believed it was only allocated waters in Texas. Texas defined Subbasin 5, for Texas's purposes, to mean "[t]hat portion of the Red River *in*

Texas, together with its tributaries, from Denison Dam down to the Arkansas-Louisiana state boundary." *Proposed Rules of the Texas Water Comm'n* (Letter from R.M. Whitenton to J.A. Wood, Nov. 19, 1986) (emphasis added), http://tinyurl.com/TX86Rules. Texas likewise planned to regulate Texas permitholders and record diversions affecting Subbasin 5 *in Texas*. *Id.*

Even as the Compact Commission approved the §5.05 compliance rules, it conceded that determining compliance would be nearly impossible if a State requested an accounting. As riparian states, Louisiana and Arkansas could not adequately track existing diversions. *Red River Compact Comm'n Annual Mtg. of 4/30/1987* 23, http://tinyurl.com/RRCC87Mtg. The Commission agreed that no decisions on how to ascertain compliance with §5.05 would be made until all States could track their own data and key gages were tested for adequacy. *Id.* at 23-25. That date has yet to arrive—not least because the Hosston Gage, which the States agreed would determine whether §5.05 obligations were triggered, was discontinued in 1994. U.S. Geological Survey, *Data for USGS 07344400 RED RIVER NEAR HOSSTON, LA*, http://goo.gl/1ssqT.

In the three decades since Compact ratification, no State has sought an accounting. Texas has published thousands of pages of reports detailing water sources. Texas Water Dev. Bd., *Water Resources Planning*, http://tinyurl.com/TXWaterPlans. Not one page suggests that the Compact gives Texas the right to divert water from Oklahoma and Arkansas. Rather, the States have understood that when flows are above 3,000 cfs, each State can freely use Subbasin 5 water within its borders.

G. Tarrant's Offer To Buy Subbasin 5 Water

From 2000 to 2002, Tarrant (along with other members of a specially-formed Texas agency) offered Oklahoma and its Native American tribes more than one billion dollars for the same water Tarrant now claims as a Compact-given entitlement. 2JA347, 362-66, 376 (Joint Proposal); U.S. Br. 28.

In 2000, Oklahoma needed revenues to repay the costs of constructing Sardis (Clayton) Lake, and identified selling waters from the Kiamichi in Subbasin 5 as a possible solution. 2JA338-44, 359, 361. Tarrant and other water districts formed the North Texas Water Agency and proposed *purchasing* these Subbasin 5 waters. *Letter from North Texas Water Agency to Gov. Keating* (Feb. 1, 2002), http://tinyurl.com/NTWALtr. During the ensuing year of negotiations, the Agency announced, "We don't want it to be shown that we paid too much." *Oklahoma, Tribes Plan Water Sales*, Dallas Morning News, Nov. 15, 2001. Yet, despite its hard bargaining posture, the Agency never played the bargaining chip Tarrant now claims it has always held: that Texas could force Oklahoma to give Texas users the same water for free.

Talks broke down in the face of forceful environmental, political, and financial objections. A. Hamilton, *Oklahoma Leaders Say Talks with North Texas Hit Impasse over Sale of Water*, Dallas Morning News, Jan. 12, 2002. Shortly after the outcry over the proposal, Oklahoma's legislators enacted many of the laws Tarrant challenged. Okla. Stat. tit. 74, §1221.A; Okla. B. Hist., S.B. 1410, 48th Leg., 2d Reg. Sess. (Okla. 2002).

Since then, Oklahoma's water has hardly stood between the Dallas/Fort Worth metroplex and parched

earth. Oklahoma's water did not even make Dallas's list of top eighteen future supplies. *Public Hearing on 2011 Initially Prepared Region C Water Plan* 19 (May 25, 2010), http://tinyurl.com/RegionCPlans. For Tarrant, Oklahoma water is not a *needed* supply to meet post-2060 demand, but a drop-in-the-bucket bonus to shore up supplies. *Id.* at 21.

H. Proceedings Below

Only in 2007 did Oklahoma, Arkansas, and Louisiana—and perhaps Texas—learn of an alleged cross-border right to Subbasin 5 waters. Tarrant filed a permit application for Subbasin 5 water in Oklahoma and sued the OWRB to prevent it from applying Oklahoma laws that Tarrant claimed were unconstitutional impediments to its permit.[8]

1. Tarrant's complaint and amended complaint stated that in addition to its dormant Commerce Clause challenge, Oklahoma laws were preempted because "[u]nder the Compact, Texas is apportioned . . . without limitation waters within Oklahoma that Plaintiff seeks to appropriate within the Kiamichi River watershed." 1JA160-61, 170. Tarrant did not allege that Texas was receiving less than 25% of "excess" Subbasin 5 waters. Nor did Tarrant allege that "excess" waters above 3,000 cfs even existed.

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[8] Tarrant also filed permits to appropriate waters in Reach I, Subbasin 2 allocated to Oklahoma under §4.02. Tarrant's petition asserts: "At issue in this case are Tarrant's futile efforts to obtain water allocated to Texas by §5.05 . . . as well as other water over which Oklahoma has free and unrestricted use under §4.02." Cert. Pet. 10. But now: "Tarrant does not press before this Court any claim to appropriate water from Reach I, Subbasin 2." Pet. Br. 50 n.14; *see also id.* at 5 n.1.

During the litigation, Texas's state reports explained that because there is no "formal accounting of water deliveries to each state" under the Compact, Texas merely checks for "any water shortages to Texas users." Texas reported it had received 100% of its Compact allocation. CA10 Defs. App. 56-57; 1JA144.

2. In the district court, Tarrant insisted that its preemption claim did not require determining States' rights under the Compact. At a 2007 hearing, Tarrant represented, "We're not saying that the Compact gives us the right to water." CA10 App. 1192. At a 2009 motion hearing, the district judge asked Tarrant's counsel, "[T]o the extent that you're here talking about Texas's rights under the Red River Compact, the allocation of its equal share . . . you're actually trying to assert Texas's rights under the Compact[?]" *Id.* at 1279. Tarrant replied: "No, Your Honor." *Id.*

In 2010, after Texas filed a four-page *amicus* brief supporting Tarrant, Tarrant explained, "[W]e're a proper party, we're asserting our right in this lawsuit [as a Texas user], not Texas's, not a right under the compact, we're asserting our right to apply for the water." *Id.* at 1342. Tarrant reiterated that the judgment it sought "wouldn't say anybody has got rights under the compact, it wouldn't say there's been a violation of the compact, it wouldn't say Texas's rights have been trampled." *Id.* at 1346. Tarrant's counsel conceded, "I agree that if you put this in terms of asserting rights under a co[m]pact . . . we wouldn't be a proper party. But we're not." *Id.* at

1344. Tarrant never attempted to present evidence as to whether Texas was receiving its 25% "share."[9]

Given Tarrant's representations, the district court unsurprisingly saw no need to parse §5.05(b)(1) in granting Oklahoma summary judgment. The court understood Tarrant as "not request[ing] the court . . . to determine water rights under the Red River Compact." *Id.* at 358. The court dismissed Tarrant's preemption argument by noting that the Compact "explicitly states it is not intended to supplant any state legislation if it is otherwise consistent with the compact." Pet. App. 70a. The court could "discern no basis upon which the [Compact] could be a basis for preemption, at least in the context of any claim which [Tarrant] has standing to pursue." *Id.*; *see also id.* at 68a n.16, 72a. The court also granted Oklahoma summary judgment on the dormant Commerce Clause claim, reasoning that congressional approval of the Compact "constituted its consent to a legal scheme different from that which would otherwise survive Commerce Clause scrutiny." *Id.* at 68a.

3. At oral argument, the Tenth Circuit questioned its jurisdiction to decide the preemption issue. *Id.* at 29a. Tarrant was asked repeatedly whether Texas was already getting its purported 25% share of water, since "it seems to be incumbent upon you all to . . . indicate that Texas is somehow being deprived of its 25%." CA10 Oral Arg. Tarrant responded, "[W]e

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[9] None of Tarrant's proposed trial exhibits (including the only exhibit discussing Texas water, the 2006 Region C report), discusses the availability of Subbasin 5 water in Texas. CA10 App. 717-33. Nor was Tarrant prevented from presenting evidence. The only evidence Tarrant referenced below concerned Hugo Reservoir legislative history and other compacts. Pet. App. 44a n.3; CA10 App. 1334-37.

do not know that, because that has never been analyzed." *Id.*

The Tenth Circuit ordered supplemental briefing on "Has Tarrant Regional Water District made a showing that the State of Texas is receiving less than its share of water under §5.05." Tarrant responded, "No. Tarrant has neither alleged nor presented evidence regarding Texas's current use or receipt of water under the Compact, since that is not an element of Tarrant's claim for relief or its Article III standing." Tarrant CA10 Supp. Br. 1. Based on Tarrant's representations that "its preemption argument does not rely on whether Texas is receiving its share," and that Tarrant can take water from Oklahoma "regardless of whether Texas is receiving its share," the Court reached the merits. Pet. App. 31a.

The Tenth Circuit affirmed the district court, holding that §5.05(b)(1) does not give Texas the right to divert Subbasin 5 waters outside its own borders. *Id.* at 40a. The Court discussed general preemption principles, describing them as relevant insofar as the Compact "generally reinforces rather than undermines state water regulation." *Id.* at 36a.

The Tenth Circuit turned to §5.05(b)(1)'s text and held, "'[E]qual rights to the use of' can reasonably be read to mean that each signatory state has the same opportunity and entitlement to use up to 25 percent of the excess water in its state and under its state laws." *Id.* at 42a-43a. The Court explained that §5.05 generally referenced state borders and was designed to ensure Louisiana downstream flows. *Id.* at 37a-38a. The Court held that §5.05(b)(1) was intended to limit the other States to no more than 25% of "excess" flows above 3,000 cfs for a similar reason, *i.e.*, to assure Louisiana of receiving some of

the "excess" flow. *Id.* at 38a. The Court accordingly held that §5.05(b)(1)'s text, other Compact provisions, and the lack of express indications that States could cross borders made Tarrant's reading unreasonable. *Id.* at 40a. In the alternative, the Court held that Tarrant's reading would "run afoul of the presumption against preemption." *Id.*

The Tenth Circuit also rejected Tarrant's dormant Commerce Clause challenge, holding that various provisions of the Compact expressed clear congressional intent to waive the dormant Commerce Clause. *Id.* at 23a-28a.

SUMMARY OF ARGUMENT

I. States do not suspend their borders, much less through silence. In the rare instances when States have granted other States the extraordinary right to cross into their territory to divert water, States have said so expressly and clearly—and then specified in detail how the water use will be regulated and how eminent domain and property rights will work. The Red River Compact is silent on all of these issues.

Tarrant nonetheless maintains that the Compact's silence means that the States consented to a broad and inordinately disruptive cross-border right, with the details to be worked out later. But assuming that the Signatory States signed off on such an unprecedented scheme would impute to them an implausible disregard for their core sovereign interests in waters within their own borders.

The drafters designed §5.05 to guarantee Louisiana and Arkansas predictable downstream flows in times of shortage and plenty. Section 5.05(b)(1) governs when flows are high, and allocates water that flows into or originates in Subbasin 5 by granting all four

States an equal opportunity to use flows "in excess of 3,000 [cfs]," subject to the limitation that no State may use more than 25% of that "excess." Section 5.05(b)(1) gives States recourse if one State disproportionately uses Subbasin 5 waters within that State's borders. A State can call for an accounting to determine how much "excess" Subbasin 5 water exists and how much States are using. §2.11. But until then, States do not know how much each receives or diverts relative to the total. This has been the state of play for thirty years. Section 5.05(b)(1) does not give States an "equal share," words that appear nowhere in §5.05 and which Tarrant seemingly created out of whole cloth. Tarrant's contrary view envisions a costly scheme of constantly calculating and recalculating "shares" that would change with every significant rainfall, dam release, or drought.

Section 5.05(b)(1) does not confer a cross-border right by omitting in express terms the obvious notion that States divert water within their borders. The drafters included and omitted border limitations arbitrarily throughout §5.05, yet the drafters clearly intended the provision to operate as a cohesive whole. Under Tarrant's view, borders would disappear intermittently with fluctuating readings of a stream gage. Moreover, other Compact provisions allocate interstate waters between States without limiting each State to water within its borders. Reading those omissions as consent to cross borders would unjustifiably transform the Compact into an unintended catalyst for interstate conflict.

The United States advances a position Tarrant eschewed below and Tarrant waived by not raising at the petition stage or in its merits brief: that

§5.05(b)(1) might authorize border-crossing to the extent that Texas cannot receive in-state 25% of excess Subbasin 5 waters. The United States proposes that a remand might be needed to resolve that factual question. But Tarrant insisted that cross-border rights exist irrespective of how much water is in Texas to avoid proving this fact or establishing standing to bring that claim. Tarrant should not get a new opportunity to change positions—not least because the United States' theory shares many of the same flaws as Tarrant's.

The negotiating history confirms that the States did not intend cross-border rights. Tarrant's merits brief tabulates raw data in a 1970 Engineering Advisory Committee report and spins the results as indisputable proof that Texas could not receive 25% of "excess" Subbasin 5 waters in-state. But the engineers never performed those calculations, and if they had, they presumably would have avoided Tarrant's math errors, which miscalculate key variables in measuring "excess" Subbasin 5 water. Our calculations reveal that Texas received at least 29% of the "excess," confirming the drafters' longstanding assumption that there was no call for an exceptional cross-border right.

The States' course of conduct is devastating to Tarrant's position. If the Compact created a remarkable cross-border right, all four Signatory States inexplicably kept it secret during thirty years of water planning. Tarrant repeatedly asserts that this right is undeniable, yet the States apparently did not know the right existed until Tarrant discovered it in 2007. Though Texas now argues that cross-border rights are "plain" and part of "the bargain it made with Oklahoma," Texas Br. 10-11, 14, Texas's

conduct, not to mention its apparent willingness to outsource its claim to a single water district, suggests that Texas lacks the courage of its convictions.

II. Once the lynchpin of Tarrant's challenge, the dormant Commerce Clause has become the dormant issue in this dispute. The Compact, Tarrant seemingly agrees, protects allocated water from dormant Commerce Clause scrutiny. Tarrant now asserts that if Subbasin 5 water in Oklahoma is not allocated to Texas, Oklahoma would have residual "unallocated" water, because Oklahoma purportedly receives the lion's share of Subbasin 5 water and Texas does not receive 25% in-state.

But there is no "unallocated" water under any reading of the Compact, which expressly allocates all Red River Basin water. Tarrant's theory of "unallocated" water also depends on its faulty calculations as to States' access to Subbasin 5 flows. Moreover, nothing in the Compact suggests an intent to insulate some subbasins but not others from scrutiny. The Compact evinces clear congressional intent to insulate Oklahoma's laws as applied to *any* compacted water. In any event, the dormant Commerce Clause is not implicated, because Oklahoma's decision to confer an initial appropriative right to divert water is not "commerce."

ARGUMENT

I. SECTION 5.05(b)(1) DOES NOT CONFER CROSS-BORDER RIGHTS

Section 5.05 allocates Subbasin 5 waters for the general purpose of ensuring flows to Louisiana, and thus sets different allocations depending on flow conditions. Sections 5.05(b)(2), (b)(3), and (c) govern when flows are low and dictate that, as flows

decrease, the percentage of inflows and runoff that the upstream States must pass to Louisiana increases.

Section 5.05(b)(1) allocates water that flows into or originates in Subbasin 5 during high flows. It grants all four States an equal opportunity to use flows in excess of 3,000 cfs, subject to the limitation that no State may use more than 25% of that excess. It thus gives States recourse if one State disproportionately uses Subbasin 5 water within its borders. Section 5.05(b)(1) states:

> The Signatory States shall have equal rights to the use of runoff originating in subbasin 5, and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 [cfs] or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 [cfs].

Tarrant maintains that this language guarantees all four States an "equal share" of 25% of "excess" Subbasin 5 water, which Texas can access in other States regardless of whether more than 25% of the "excess" water falls within Texas. Pet. Br. i, 27. Tarrant seeks to exercise that right by constructing giant pipelines into the ecologically pristine Kiamichi River to transport a permanent appropriation of 310,000 acre-feet (101,013,810,000 gallons) of water annually into Texas. 2JA8-12 (permit application).

But §5.05(b)(1) nowhere provides that States may enter other States to obtain Subbasin 5 water. Section 5.05(b)(1) also does not include the words "equal share," despite Tarrant's prolific use of quotation marks around those words in the merits-stage question presented and throughout its brief. *Compare* Cert. Pet. i. The 25% clause is phrased as a

prohibition, not an entitlement to a fixed 25% allocation. Core principles of sovereignty and standard tools of compact interpretation foreclose reading the Compact's silence on cross-border rights as creating an unprecedented free-for-all where States can take water from other States.

A. The Signatory States Did Not Silently Relinquish Their Sovereignty

1. Control over waters and land within a State's borders are quintessential elements of State sovereignty. *E.g.*, *California v. United States*, 438 U.S. 645, 658, 663 (1978); *Arndt v. Griggs*, 134 U.S. 316, 323 (1890). So too is a State's control over whether its powers of eminent domain will be used to build pipelines through its territory. *E.g.*, *Georgia v. City of Chattanooga*, 264 U.S. 472, 480 (1924).

The Compact should not be read to disturb those foundational principles absent express language confirming the States' intent to do so. The Tenth Circuit described this sentiment as a "presumption against preemption." Pet. App. at 34a-35a. More precisely, this case is governed by an especially apt presumption in the context of compacts: States do not cede sovereign powers *sub silentio*. *Virginia v. Maryland*, 540 U.S. 56, 67 (2003); *see Alabama v. North Carolina*, 130 S. Ct. 2295, 2312-13 (2010). Likewise, absent a clear statement, the presumption is that Congress does not intend to invade State sovereignty over water use. *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *cf. Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). But in Tarrant's view, the Signatory States blithely abdicated core sovereign powers over the use and administration of in-state water by failing to specify expressly that

"excess" Subbasin 5 water could be diverted only within each State's borders.

No interstate water compact allows one State to divert water from another State absent express language authorizing cross-border diversions. When a State decides to grant other States the right to divert water from within its borders, compacts use the same clear words: the State explicitly grants rights to acquire water "in one State for use in the other."[10] The drafters of the Red River Compact not only studied compacts providing for cross-border rights; several drafters helped negotiate them. Chapman, *supra*, at 67, 72.

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[10] Amended Bear River Compact, art. VIII(A), 94 Stat. 4, 12 (1980) ("[N]o State shall deny the right of another signatory State . . to acquire rights to the use of water . . . in one State for use of water in another"); Amended Costilla Creek Compact, art. III(2), 77 Stat. 350, 353 (1963) ("Each State grants for the benefit of the other . . . the rights . . . in one State for use in the other"); Klamath River Basin Compact, art. V(A), 71 Stat. 497, 500 (1957) ("Each state hereby grants for the benefit of the other . . the right . . . in one state for use in the other"); Snake River Compact, art. VIII(A), 64 Stat. 29, 32 (1950) ("neither State shall deny the right of the other State to acquire rights to the use of water . . . in one State for use in the other"); South Platte River Compact, art. VI(1), 44 Stat. 195, 198 (1926) ("Colorado consents that Nebraska and its citizens may . . . divert water from the South Platte River within Colorado for use in Nebraska"); Upper Colorado River Basin Compact, art. IX(a), 63 Stat. 31, 37 (1949) ("[N]o State shall deny the right of another signatory State . . . to acquire rights to the use of water . . . in an upper signatory State for consumptive use in a lower signatory State"); Yellowstone River Compact, art. VII(A), 65 Stat. 663, 668 (1951) ("A lower signatory State shall have the right . . . in such upper State for the purpose of conserving and regulating water . . . apportioned to or appropriated by the lower State").

Compacts that intend to create cross-border rights also detail how one State can obtain the property needed to access water within another State's borders. Usually, such compacts specify that the diverting State has "the right to acquire such property rights as are necessary to the use of water," including "through the exercise of the power of eminent domain." Snake River Compact, art. VIII(B), 64 Stat. 29, 32-33 (1950). Compacts then explain how eminent domain will work, *e.g.*, the diverting State requests the other State to use its eminent domain powers for the diverting State's benefit. *Id.* Compacts elaborate who bears the costs of acquiring the property—as a rule, the diverting State—and how payments will be made ("at the time and in the manner prescribed by the State requested"). *Id.*[11] The words "eminent domain" and "property rights" do not even appear in the Red River Compact.

Not only that: when States want to allow other States to take water within their borders, compacts describe exactly *where* the diversion is allowed, *e.g.*, from "the south bank of [the South Platte River] at a point southwesterly from the town of Ovid, Colorado." South Platte River Compact, art. VI, 44 Stat. 195, 198 (1926).[12] States do this to prevent what Tarrant

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[11] *Accord* Amended Bear River Compact, art. VIII(B) ("Any signatory State . . . shall have the right to acquire in any other signatory State such property rights as are necessary to the use of water . . . through the exercise of the power of eminent domain," and "all costs . . . shall be paid by the requesting State"); Klamath River Basin Compact, art. VI(A) (similar); Yellowstone River Compact, art. VIII (similar).

[12] *Accord* Klamath River Basin Compact, art. V(A) ("The location of [diversion facilities in one state for use in the other] shall be subject to approval by the commission.").

brazenly seeks to do here: choose the most desirable point of diversion—even if it happens to be within an environmentally fragile intrastate stream in another State.

Compacts also unmistakably specify which State's laws will govern the cross-border right, and how water and permitting rights will be administered. Cross-border rights under the Kansas-Nebraska Big Blue River Compact are "subject to the laws of the State of Nebraska." Art. XII(1), 86 Stat. 193, 198 (1972). Cross-border water rights granted to a "lower Signatory State" under the Yellowstone River Compact are "subject to the rights of the upper State to control, regulate, and use the water apportioned to and appropriated by it," and are governed by "the laws of the upper State." Arts. VII(A), IX, 65 Stat. 663, 668-69 (1951).[13] Yet nowhere in the Red River Compact, its Interpretive Comments, the §5.05 compliance rules, or the scores of Compact Commission meetings are these topics addressed.

2. Reading silence as consent to an implied cross-border right would create a jurisdictional nightmare. Section 2.01 of the Red River Compact generally provides that each State "may use the water allocated to it . . . in any manner deemed beneficial by that state," and "may freely administer water rights and uses in accordance with the laws of that state." Tarrant never explains who would regulate Texas users' diversions from Oklahoma under that provision, or how, or why. Tarrant hypothesizes that

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[13] *Accord* Amended Bear River Compact, art. VIII(C) (diversion facilities "shall be subject to the laws of the State in which the facility is located"); Klamath River Basin Compact, art. VI(B) (same); Snake River Compact, art. VIII(C) (same); Upper Colorado River Basin Compact, art. IX(c) (same).

Oklahoma would still permit water purportedly allocated to Texas. Pet. Br. 19. Tarrant elsewhere envisions that both "Oklahoma and Texas permitting authorities . . . will act on petitioner's permit applications." Pet. Supp. Br. 5. Meanwhile, Texas contends that if Tarrant prevails, "Texas will have authority to administer rights to its share of Subbasin 5 water" under §2.01. Texas Br. 13 n.3; *see id.* at 14. Texas's water permitting agency seemingly took another view by stating that it lacks jurisdiction over Tarrant's proposed diversion from Oklahoma. CA10 Defs. App. 111-13.

If the Compact empowers Texas to authorize diversions from Oklahoma, the Compact inexplicably exempts Texas from the rule that a State's sovereign powers "end[] at its political border." *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 315 (1990). If, on the other hand, Oklahoma must permit water allocated to Texas, Oklahoma would face a difficult bind. When Texas users apply for permits, Oklahoma would not know how much of Texas's 25% "share" Texans already used. If Texas had already exceeded its share, Oklahoma could be facilitating a Compact violation. At minimum, Oklahoma could not adjudicate permit applications absent continual updates from Texas as to how much Subbasin 5 water Texans already used. Nor could Oklahoma readily resolve competing demands between the other three States, which could all, under Tarrant's theory, take their entire 25% "share" from within Oklahoma.

The problems do not end there. Tarrant maintains that the Compact entitles Texas users to build facilities in Oklahoma to store Texas's waters. Pet. Br. 29-30. But Tarrant nowhere explains how Texas users could obtain the right to acquire and use Oklahoma's

land—including through eminent domain. Reading the Compact to allow Texas to exercise eminent domain over Oklahoma property, or to compel Oklahoma to exercise those powers on Texas's behalf, would vitiate a "power . . . essential to the life of the state." *Georgia*, 264 U.S. at 480. Conversely, if the Compact gives Texas access to out-of-state water but no right to the property required to pipe or store it, Texas users apparently must transport buckets of Oklahoma water back to Texas by the truckload.

Less than a century ago, Oklahoma and Texas nearly went to war when each attempted to administer the same resources within the same territory. *Oklahoma*, 258 U.S. at 579-80. This Court described the "conflicting assertions of jurisdiction and the measures taken to sustain them" as "detrimental to the public tranquility." *Id.* at 580. If the Compact's drafters intended anything, it was surely to foreclose the possibility that Texas Rangers might yet again square off against Oklahoma's militia over competing jurisdictional claims in the Red River Basin.

B. The Compact's Text And Structure Foreclose Tarrant's Interpretation

1. *Each State Has An "Equal Right" To "Excess" Subbasin 5 Water Subject To A 25% Cap*

Section 5.05(b)(1) imposes a cap on water use, not a guarantee of an equal share of water. It creates a check on excessive usage of Subbasin 5 water in times of plenty. When flows into Louisiana exceed 3,000 cfs, the States have "equal rights" to use water that flows or rains into Subbasin 5, but no State may use "more than 25 percent" of the "excess" over 3,000 cfs. "[E]qual rights" afford each State an equal

opportunity to make beneficial use of "excess" water in their State. Pet. App. 42a-43a. Absent this language, if an upstream State's users diverted all "excess" Subbasin 5 water within its borders, while a downstream State made no use of its water, the upstream State's users could gain a permanent priority over the downstream State. *See* F. J. Trelease, *State Water and State Lines: Commerce in Water Resources*, 56 U. Colo. L. Rev. 347, 347, 349 (1985).

The words "equal rights to the use" of water in §5.05(b)(1)'s first clause place downstream States on equal footing with Texas and Oklahoma upstream, even if the latter States develop water faster. The limitation that "no state is entitled to more than 25 percent" of "excess" water then caps how *much* "excess" water any State may use. Pet. App. 40a. The cap at least theoretically establishes a metric for determining if a State is hoarding "excess" water. That cap is imposed, however, only if a State calls for an accounting to determine how much "excess" Subbasin 5 water exists and is being used at any moment. §2.11. Absent an accounting, States do not know how much each State receives or diverts relative to the total, and what each State's usage should be. 1JA55 (Rule 5(a)(4)). That is exactly as the States intended, given the difficulty and expense of regular monitoring.[14]

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[14] The 1983 Engineering Advisory Committee Worksheet Tarrant lodges, Pet. Br. 44, comports with this reading. The first step in ascertaining whether another State has used "more than 25 percent of the water in excess of 3,000 cfs" is to determine the *total* water in Subbasin 5. Nor do we read the Tenth Circuit's decision to disagree. *Cf.* Pet. Br. 47 n.13. Section 5.05(b)(1) allows each State to use "excess" water within its borders, up to 25% of the total amount of water in excess of

The Interpretive Comments support this reading. "When the flow is high, above 3,000 cfs, all states are free to use *whatever amount of water they can put to beneficial use*." 1JA29-30 (emphasis added). That language confirms that 25% is a cap, not a fixed entitlement, and that States can use whatever they wish until a State calls for an accounting. The comments continue: "If the states have competing uses and the amount of water available in excess of 3,000 cfs cannot satisfy all such uses," the States "honor the other's right to 25% of the excess flow" by using no more than 25% themselves. 1JA30.

Section 5.05's sequential structure reinforces that States can access and use Subbasin 5 water only within their borders. Pet. App. 36a-40a. Sections 5.05(b)(1)-(3) and (c) share a common purpose: to ensure that Louisiana—and, in §5.05(c), Arkansas—receive sufficient downstream flows. *Id.*; 1JA27-28 (Interpretive Comments). Each provision prevents upstream States from taking too much water. Section 5.05(b)(3) requires Arkansas, Oklahoma, and Texas to pass to Louisiana *all* runoff and inflows in Subbasin 5 "within their respective states" when flows at the Arkansas-Louisiana border are below 1,000 cfs. Section 5.05(b)(2) requires the three States to pass to Louisiana 40% of the runoff and inflows in Subbasin 5. Section 5.05(b)(1) guarantees Louisiana at least 3,000 cfs, as well as a share of "excess" water, when flows exceed 3,000 cfs. And §5.05(c) protects Arkansas when it receives little water from Texas and Oklahoma, by requiring Texas and Oklahoma to pass to Arkansas 40% of the "runoff originating in subbasin 5 within their respective states."

3,000 cfs in Subbasin 5, as the Tenth Circuit recognized. *See* Pet. App. 42a-43a.

Section 5.05 also specifies how much water upstream States can use at different flows: none (under §5.05(b)(3)); 60% of their own runoff and inflows (under §5.05(b)(2) and (c)); and no more than 25% of the total water over 3,000 cfs in Subbasin 5 when States have competing uses (under §5.05(b)(1)). But §5.05's primary purpose was for "the upstream states [to] agree to cooperate in assuring a reliable flow to Louisiana." 1JA27-28 (Interpretive Comments); *accord* Pet. App. 37a-39a.

2. The Text Does Not Create A Borderless Right To An Equal Share Of Water

a. Tarrant theorizes that "the Compact entitles each State to an 'equal share' of Subbasin 5 water" that can be diverted anywhere within Subbasin 5. Pet. Br. 9. But §5.05(b)(1) allocates each State "equal rights to the use" of water, not an "equal share," a phrase that appears only in Tarrant's brief. Had the drafters wanted to allocate "equal shares" of "excess" Subbasin 5 water, they would have said so or allocated each State exactly 25%. *See* §6.01(b) (allocating fixed percentages). But "equal rights to the use" of no "*more than* 25 percent" of "excess" water can only mean a cap.

An "equal right" certainly cannot mean that each State receives an "equal amount" of Subbasin 5 water. *Contra* Pet. Br. 9; *see also id.* i, 2. States only have "equal rights to the use" of "excess" water, which exists only when at least 3,000 cfs flows across the Arkansas-Louisiana border into Louisiana. If Louisiana also shares equally in "excess" water above 3,000 cfs, Louisiana receives 3,000 cfs plus some "excess," while the other States only receive "excess." Conversely, if that 3,000 cfs counts against Louisiana's "share," Louisiana may still receive more water

than the other States. 1JA55 (Rule 5(2)). Either way, fixed, "equal" allocations were plainly not intended.[15]

Tarrant's "equal share" theory is also incompatible with the compliance regime the States chose. To figure out what "share" States are owed, each State would have to monitor extensive data at enormous expense. States would have to calculate inflows, rainfall, and diversions in each State—no easy feat, since Arkansas and Louisiana do not routinely track these data. States would then have to add those figures to get the total quantity of Subbasin 5 water, subtract 3,000 cfs to get the "excess," and divide by 4. All four States would have to pool their data to compare their "share" with what they received and used—something the States considered infeasible even when the compliance rules were adopted. *Supra*, p. 18.

The difficulties multiply from there. An "equal share" of water depends on the amount of "excess" Subbasin 5 water at any moment, and that amount fluctuates. When States release more or less water from dams, a heavy rain falls, or a brutal drought descends, the total amount of Subbasin 5 water changes dramatically. Calculations would begin anew.

But the States expressly did "not envision[] that [accounting] will be undertaken as a routine matter." 1JA16 (Interpretive Comments). They had no appetite for "extensive gaging and record keeping," nor

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[15] The compliance rules do not allocate equal shares among the States, and underscore the difficulties of implementing any fixed-allocation scheme under §5.05(b)(1). Indeed, the drafters were unable to reconcile §5.05(b)(1)'s text and the compliance rules—which add conditions nowhere apparent on the face of §5.05(b)(1). 1JA55 (Rules 5(2)-(3)).

the "significant financial burden" for the States and the uncertainty for water planning. 1JA16. Such calculations will be performed under §2.11 "only upon the demand of an affected state." 1JA15-16; *see also* 1JA55 (Rule 5(4)). Not only have no States asked, they have not undertaken the routine data collection Tarrant's approach requires—and the Hosston Gage has been out of commission since 1994.

b. Tarrant's "plain language" reading of §5.05(b)(1) paradoxically relies on its "'silence' concerning state lines." Pet. Br. 27. The provision has no language, plain or otherwise, that creates cross-border rights. Nor do Tarrant's inferences from silence establish them.

Tarrant's observation that other Compact provisions explicitly reference state borders is true but unenlightening. Pet. Br. 28-29. Respect for sovereign borders was too obvious to the drafters to require elaboration in every provision, let alone throughout §5.05. Section 5.05(b)(3) states that during low flows (below 1,000 cfs), States must pass to Louisiana all runoff originating in Subbasin 5, and all undesignated waters "flowing into subbasin 5 within their respective states." But the words "within their respective states" are superfluous there; States cannot pass waters *outside* their borders.

Conversely, §5.05(b)(2)—a provision Tarrant ignores—omits the words "within their respective states." Section 5.05(b)(2) lessens the States' downstream obligations when flows are above 1,000 cfs but below 3,000 cfs. Arkansas, Oklahoma, and Texas must pass to Louisiana "40 percent of the total weekly runoff originating in subbasin 5 and 40 percent of undesignated water flowing into subbasin 5." That can only mean *within each State's borders.*

Each State cannot pass 40% of the water in the entire subbasin; Louisiana would end up with an impossible 120% of the water. The Interpretive Comments thus read "within each State" into §5.05(b)(2)—yet they omit the phrase when describing §5.05(b)(3). 1JA30.

Assigning meaning to the inconsistent usage of boundary-limiting language within §5.05 would produce jarring and arbitrary results when, as is often the case, flows fluctuate above and below 3,000 cfs, *i.e.*, between §§5.05(b)(1) and (b)(2).[16] When flows are just below 3,000 cfs, Arkansas, Oklahoma, and Texas can freely use 60% of the Subbasin 5 waters within their borders. §5.05(b)(2). Yet under Tarrant's theory, the moment flows exceed 3,000 cfs, States can cross borders to divert their "share" of excess flows. Section 5.05(c) renders Tarrant's theory even more illogical. Under that provision, even if the flow at the Arkansas-Louisiana border exceeds 3,000 cfs, if the flow at the Texas-Arkansas border is below 526 cfs—*i.e.*, if Arkansas is disproportionately generating downstream flow to Louisiana—§5.05(b)(1) no longer applies. Under Tarrant's theory, cross-border rights would again abruptly cease. Texas and Oklahoma instead release and use water within their borders. §5.05(c).

If the 3,000 cfs threshold is an on-off switch for borders, cross-border diversions create a host of logistical dilemmas. If Tarrant proceeded with diversions from Oklahoma, the moment flows dipped below 3,000 cfs (triggering §5.05(b)(2)) or flows at the

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[16] The Hosston Gage was discontinued, but a nearby gage shows that over the last fifteen years, flows fall below 3,000 cfs at least one or two months every year. U.S. Geological Survey, *USGS 07344370 Red River at Spring Bank, AR*, http://tinyurl.com/GageData.

Arkansas border fell below 526 cfs (triggering §5.05(c)), Texas would face serious problems. Any diversions Tarrant then made—not to mention any pipelines Tarrant installed on Oklahoma's soil—would violate the Compact and Oklahoma's sovereignty until flows exceeded 3,000 cfs. The drafters cannot have intended a cross-border right that would flicker in and out of existence with a gage reading.

The problems with assigning talismanic significance to words mentioning borders extend beyond §5.05. Throughout the Compact, the drafters omitted state-border limitations with seeming abandon. Assigning significance to those omissions would upend the States' settled understandings of those provisions. Section 2.01 does not limit each State "to freely administer water rights and uses" within its borders, but the United States adds the phrase "within *its* borders" when describing that clause. U.S. Br. 24.

Section 4.01(b) also says nothing about borders when it apportions the flow of interstate streams in Reach I, Subbasin 1 "60 percent to Texas and [40] percent to Oklahoma." *Compare* §4.01(b), *with* §7.02(b). But all that water originates in Texas. 2JA313 (map). Under Tarrant's view, Oklahoma users apparently can enter Texas to take Oklahoma's 40%. Likewise, Reach III is allocated using boundary-free language that under Tarrant's view would authorize Arkansas to cross into Texas, §6.01(b), Louisiana to cross into Arkansas, §6.02(b), and Louisiana to cross into Texas, §6.03(c); 2JA332 (map). If every omission of "within its borders" was deliberate, the Compact not only made Subbasin 5 a free-for-all; it returned the Red River Basin to a borderless Wild West. There is, of course, a simpler answer: because the drafters

assumed allocations would always be within States' borders, there was no need to say so incessantly.

Tarrant is equally wrong that §5.05(b)(1) implicitly authorizes cross-border diversions because §§2.05(c) and 2.05(d) "provid[e] expressly for cross-border transfers of water." Pet. Br. 29. Section 2.05(d) lets States use the Red and its tributaries like a highway, for the sole purpose of *transporting* allocated water. §2.05(d). That provision does not speak to diversions, much less diversions across State borders. And §2.05(c) lets States store "water which is either imported or is to be exported"—*i.e.*, water from outside the Red River Basin. §2.05(c); 1JA15 (Interpretive Comments). It does not allow States to construct storage in other States.

3. Tarrant's Reliance On The Structure Of Reach II Is Meritless

Tarrant argues that because Subbasin 5 is not in Louisiana, Louisiana must cross into other States to access its "share" of water. Pet. Br. 31-34. If Tarrant is right, Louisiana has not received its share for thirty years, yet has never objected. If so, Louisiana is not just sleeping on its rights; Louisiana has thrown self-interest to the wind by not supporting Tarrant.

Further, States are not required to *use* Subbasin 5 waters within Subbasin 5, as Tarrant assumes. *Id.* at 32. Louisiana need not be located within Subbasin 5 to receive "excess" Subbasin 5 water because Subbasin 5 empties into Louisiana. By calling for an accounting, Louisiana can limit the other States' usage, guaranteeing that the remainder flows into Louisiana. It is irrelevant that Louisiana receives Subbasin 5 waters once they flow into Reach V,

which is allocated to Louisiana. *Contra* Pet. Br. 31. Section 5.05(b)(1) assures Louisiana that certain flows will *enter* Reach V.

Tarrant erroneously surmises that the drafters' only purpose in creating Subbasin 5 was to confer "equal shares . . . in times of high flow." Pet. Br. 36-37. The drafters created Subbasin 5 before the States agreed upon how it should be allocated. *Supra*, p. 10. As Tarrant recognizes, Pet. Br. 35, Subbasin 5, as drawn, ensures that upstream States *never* have to release water from their reservoirs and dams for Louisiana's benefit. That purpose does not depend on *how* Subbasin 5 is allocated, as confirmed by the substantial variations in State allocations depending on whether flows are low or high. §5.05(b)(1)-(3), (c).

Tarrant infers that because upstream States control dams above Subbasin 5, Subbasin 5 water is water "the upstream States intend *not* to use." Pet. Br. 35. But Subbasin 5 water comprises runoff *originating in* Subbasin 5, not just inflows from other subbasins. States cannot control the rain—and Subbasin 5 runoff appears substantial. *Report of the Eng'g Advisory Comm. to the Red River Compact Comm'n* B-66 (June 1970). The drafting history also belies the notion that States "intend not to use" this water. Pet. Br. 35. Texas valued the water downstream of Texarkana Lake in Texas's part of Subbasin 5 enough to refuse Arkansas's request to let all of this runoff flow to Arkansas. 2JA271-72 (minutes).

Tarrant relatedly is wrong that States have no use for Subbasin 5 water within their borders because in-state users would always take water from upstream subbasins. Pet. Br. 37. Taking water upstream depletes upstream reservoirs, which are often major

recreational sites, not just storage devices. *See, e.g.*, *Hugo Lake Recreation, supra*. Those uses require States to keep high water levels above their dams; by diverting below dams, municipal users avoid impairing other uses.

Tarrant and the army of North Texas *amici* who have lined up behind Tarrant to march into Oklahoma portray Oklahoma as a water-rich profligate. But Oklahoma is not flushing its wealth away while Texans go thirsty. Oklahoma's waters flow to Arkansas and Louisiana; for those States, Oklahoma's "wasted" water naturally dilutes their inflows and saves costly treatment. CA10 Defs. App. 2-5.

4. No Remand Is Warranted

The United States posits that §5.05(b)(1) might authorize cross-border diversions if Texas were not "capable of accessing its share of water from within its own borders." U.S. Br. 24. The United States suggests this Court could remand the case so that Tarrant could attempt to prove that fact. *Id.*; *id.* at 27.

This Court should not give Tarrant a second bite at the apple. *Cf. Already LLC v. Nike, Inc.*, 133 S. Ct. 721, 732 (2013). Tarrant's choices below left this issue unresolved. Tarrant has deliberately declined to argue that §5.05(b)(1) confers cross-border rights when States cannot access their purported 25% share within their borders, presumably because Tarrant might lack standing unless it showed that Texas could not access its 25%. Instead, Tarrant has maintained that it need not show whether Texas was receiving its 25% "share" because §5.05(b)(1) allows cross-border diversions regardless of how much a State receives in-state. *Supra*, pp. 22-23.

Given that no State ever has called for an accounting, we know of no facts (nor has Tarrant identified any) suggesting that Texas is not receiving at least 25% of any "excess" Subbasin 5 water. Texas pointedly never says whether, in *Texas's* view, Texas receives less than 25%. Texas Br. 13-14. Tarrant's belated calculations of raw data in a 1970 Engineering Advisory Report reveal nothing about present conditions and miscalculate past conditions. *Infra*, p. 48. And the possibility that Texas's share might ever fall below 25% was of little concern to Texas during Compact negotiations. Texas won substantial concessions elsewhere in Reach II—and Texas can always release more water into Subbasin 5 from its dams. *Supra*, p. 15. After six years, this litigation should not begin anew just to give Tarrant further opportunities to change positions.

The United States' position also suffers similar flaws as Tarrant's. Construing §5.05(b)(1) to mean that States may cross borders at will whenever their "share" of "excess" Subbasin 5 waters within their borders is less than 25% would eviscerate state sovereignty, thwart interstate harmony, and reward gamesmanship. By restricting inflows from its dams into Subbasin 5, a State could dramatically reduce its in-state access to 25% of all "excess" Subbasin 5 waters. In order to receive an "equal share," a State then could compel other States to grant it access to *their* Subbasin 5 waters. The drafters surely did not intend to reward States that hoard water above their dams with the right to take water from *other* States.

C. The Compact's Drafting History Forecloses Tarrant's Interpretation

1. From the beginning, Subbasin 5 excluded cross-border rights. The 1965 drafts had border

limitations. *Supra*, p. 11. A 1966 draft likewise specified that Oklahoma and Texas could divert set percentages of water flowing from Denison Dam to the Oklahoma-Arkansas border "in their respective States," while similar language limited Texas's and Arkansas's diversions from the Texas-Arkansas stretch of Subbasin 5. *1966 Draft Compact*, *supra*, 15-16.

The drafters grew dissatisfied with the imprecision of the data behind these percentages, however, and abandoned the idea of allocating fixed percentages to each State. *Supra*, pp. 12-13. Instead, drafts from 1972 through 1975 proposed that Texas, Oklahoma, and Arkansas would have "free and unrestricted use of the waters of this sub-basin" once flows at the Arkansas-Louisiana border exceeded certain levels. *Supra*, pp. 12-14. That language, too, limited States to waters within their borders. "Free and unrestricted use" grants a State full dominion over allocated water, including the right to use, regulate, and restrict all the water. Multiple States cannot each fully control the same water; each State's "use" was necessarily limited to water within its boundaries. Through 1975, all States considered this language final. *Supra*, p. 13.

Only after the Corps assumed drafting responsibilities in 1976 did the current §5.05(b)(1) emerge. The 1976 draft proposed for the first time that when flows exceeded 3,000 cfs, the States would have "equal rights to the use of" Subbasin 5 waters, "provided that no State is entitled to more than 25 percent of the water in excess of 3,000 [cfs]." *1976 Draft* 17 (§5.05(b)(1)). Those revisions fixed the tragedy-of-the-commons problem lurking in earlier drafts. If upstream States had "free and unrestricted use" of Subbasin 5 waters once flows exceeded 3,000

cfs, an upstream State could disproportionately use Subbasin 5 waters within its borders, at the expense of downstream States. Adding the concepts of "excess" flows and "equal rights" and imposing a 25% cap on each State's usage avoided that problem. *Supra*, pp. 35-36.

No one understood these alterations as eliminating State borders, or as returning to the fixed percentage-based allocations the drafters had rejected. Nothing suggests that Texas's concerns about in-state access to Subbasin 5 water prompted these changes. Indeed, Texas never bargained for a cross-border right in any of the Compact Commission's sixty negotiating meetings. Texas accepted draft after draft referencing borders. *Supra*, pp. 11-15. Texas's water planners, meanwhile, pursued out-of-state water purchases to address future shortages, and never proposed out-of-state Subbasin 5 waters as a possible source. *Id.* at 6-8; 2JA195-96 (1974 minutes). And Texas's attempts to divert out-of-state water made the issue so politically radioactive that Arkansas, Louisiana, and Oklahoma officials refused to give Texas *any* water within their States. *Supra*, pp. 7-9, 16.

2. a. Tarrant asserts that there "is no denying" the drafters' understanding "that Texas would not be able to access a 25% allocation" of such waters within Texas. Pet. Br. 44; *see id.* at 2, 9 n.5, 24, 32-33. Tarrant's sole support for that proposition is a 1970 Engineering Advisory Report consisting of raw data that purportedly made the drafters "well aware" of Texas's inability to access its "full" 25%. *Id.* at 44. But the engineers never performed the calculations Tarrant undertakes. *Id.* at 9 n.5. The Commission was sufficiently underwhelmed by the data that

drafts provided for "free and unrestricted use" of "excess" Subbasin 5 water for years thereafter. *Supra*, pp. 12-14.

The danger in belatedly performing back-of-the-envelope calculations in a merits brief is obvious. We dispute those calculations. Tarrant's 11% to 16% range accounts for only one of the two components of Subbasin 5 flows. Tarrant summed *inflows* into Subbasin 5, but omitted runoff *originating* in Subbasin 5. *Compare* §5.05(b)(1), *with* Pet. Br. 9 n.5; *Report of the Eng'g Advisory Comm. to the Red River Compact Comm'n* B-66 (June 1970). Tarrant appears to have double-counted inflows from the same streams at different gaging points. Tarrant also calculated the percent of *total* Subbasin 5 flows coming from Texas, not the percent of "excess" waters in Texas. These miscalculations grossly understate Texas's "share." When these errors are corrected, our calculations show that Texas's share of "excess" Subbasin 5 water is at least 29%.[17]

b. Tarrant emphasizes the legislative history of Hugo Reservoir, Pet. Br. 45-46, but the only fact Tarrant unearths is that in 1956 and 1962, Hugo Reservoir was considered a possible future supply for North Texas. *Id.* But Hugo Reservoir is in Reach II, Subbasin I. Oklahoma's "unrestricted use" of that water allows Oklahoma to stop *any* water from flow-

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[17] These rough calculations are no substitute for the difficult, burdensome, and constant real-time monitoring and reporting that would be required under Tarrant's view to determine compliance. The 1970 report omits data for most of the rivers on *Texas's* side of the subbasin; it contains no data to calculate weekly runoff in each State; it averages annual flows over several decades, rather than tabulating weekly flows; and almost none of the gages used in the report are in Subbasin 5.

ing from there into Subbasin 5. *See id.* Tarrant produces no evidence that *Subbasin 5* waters in Oklahoma were intended as a consolation prize to North Texas. No evidence shows that the Compact's drafters knew of any North Texan expectations as to Hugo Reservoir. *Cf.* 1JA21 (Interpretive Comments discussing significance of Denison Dam authorizing legislation). Tarrant's argument also proves too much. If the drafters intended to vindicate Texans' expectations by giving Texas access to Oklahoma water, only Texas should have been granted cross-border rights. Pet. App. 42a. In any event, Congress never promised Hugo Reservoir waters to Dallas/Fort Worth. *Supra*, p. 6.

c. Tarrant also argues that three scattered and ambiguous statements during a 1965 Commission meeting show that "States would have cross-boundary access to water within Subbasin 5." Pet. Br. 43. But all drafts prepared during that meeting indicated that States could only divert water from the parts of Subbasin 5 corresponding to their borders. *Supra*, p. 11. And the 1966 draft Tarrant lodges shows that soon after that meeting, the drafters apportioned Subbasin 5 waters "in their respective States." *1966 Draft Compact* art. VI(B)(5)-(6). If the 1965 comments were even about cross-border access, the 1966 draft rejected them.

D. The Parties' Course Of Conduct Forecloses Tarrant's Interpretation

"The parties' course of performance under [a] Compact is highly significant" evidence of the parties' intent. *Alabama*, 130 S. Ct. at 2309. If the States created an extraordinary cross-border right, one would expect at least one of the four states to mention it. But the parties' course of performance is

the dog that did not bark for thirty years, not just a night-time. *Cf.* A. Doyle, *Silver Blaze,* in *The Complete Sherlock Holmes* 335 (1927).

When the States negotiated compliance rules, one would expect some mention of how cross-border rights could be administered. The rules devote not a word to the subject. 1JA52-64. If the States believed that §5.05(b)(1) conferred a 25% "equal share" of "excess" Subbasin 5 waters, routine accounting would be needed. Yet when the States negotiated the compliance rules they agreed routine accounting was out of the question. In the thirty years of the Compact, no State has called for an accounting or run the numbers. And how could they? The Hosston Gage—the only agreed-upon means of measuring flows—went offline in 1994. *Supra*, p. 18. Yet no State has proposed revising the rules, which can no longer be implemented as written. If the States believed the Compact gave them a common pool of interstate water, one would expect some acknowledgement in their water plans. But none exists.[18]

If Texas believed it could divert out-of-state Subbasin 5 waters for free, one wonders why Texas attempted to *buy* Arkansas's water immediately after ratification. *Supra*, pp. 16-17. If Texas believed it could access out-of-state Subbasin 5 waters, one wonders why Texas's internal compliance rules defined Subbasin 5 waters as waters *within Texas*. *Id.*, p. 18. If Texas believed it could never receive its 25% "share" within Texas, one wonders why Texas reports

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[18] Although Tarrant's *amici* claim they relied on Texas's purported cross-border rights in their water planning, they conveniently omit citations. *E.g.*, Upper Trinity Reg. Water Dist. Br. 5.

confirmed repeatedly that Texas was receiving all waters allocated to it. *Id.*, p. 21. If Texas believed it had a right to divert Subbasin 5 Kiamichi River water, one wonders why the Texas districts now involved in this lawsuit offered Oklahoma and its tribes over one billion dollars for that water. *Id.*, pp. 19-20. And if Texas believed it had a cross-border right, one wonders why it waited three decades for a four-page district court *amicus* brief to obliquely announce it. Texas Dist. Ct. Br. 2 (W.D. Okla. Docket #158). At minimum, Texas's uncharacteristic timidity in asserting a valuable right is "some evidence," if not confirmation, that this was not a right the Compact created. *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012).

II. THE DORMANT COMMERCE CLAUSE DOES NOT APPLY

Tarrant has demoted its dormant Commerce Clause argument from the centerpiece of its petition to an afterthought. *Compare* Cert. Pet. i, 2-3, 10, 14 n.5, 20 n.9, 21, *with* Pet. Br. i. Tarrant's supplemental brief maintained that the Clause might be relevant if the Compact allocated to Texas water within Oklahoma. Pet. Supp. Br. 3 n.2. Now, Tarrant apparently agrees that the Compact protects all allocated waters from dormant Commerce Clause scrutiny. It instead argues that if there are no cross-border rights under §5.05(b)(1), there may be "unallocated" Subbasin 5 water that the Clause compels Oklahoma to make available to out-of-state users. This argument fails at every turn.

A. All Compact Water Is "Allocated"

Tarrant maintains that "[b]ecause a majority of Subbasin 5 water is located in Oklahoma, . . . a sub-

stantial amount [of] the water located in Oklahoma is unallocated" and available for permitting to Tarrant. Pet. Br. 47 n.13. But the very notion of a compact precludes unallocated water. The Compact allocates *all* "the water of the Red River and its tributaries." §1.01(b). And §5.05 "allocates" all "runoff originating in" and "undesignated water flowing into" Subbasin 5 at different flow levels.

Tarrant's theory also hangs on the same unproven (and erroneous) fact referenced above—that Oklahoma has "unallocated" water because Texas is unable to access up to 25% of "excess" Subbasin 5 waters within its borders. But under §5.05(b)(1), the allocation is clear: States can use any "excess" Subbasin 5 waters within their respective States unless and until a State calls for an accounting. Even if the 25% cap were then applied, water would not be "unallocated" if some "excess" water flowed unused to downstream States.

B. The Compact Insulates Oklahoma's Laws From Scrutiny

In any event, the Compact insulates Oklahoma's laws from dormant Commerce Clause scrutiny. The point of a water compact is that each State is allocated water for its exclusive use. The drafters did not spend decades divvying up the Red River Basin with congressional blessing only to open the door to demands by the other 46 States to be on an equal footing for access to compacted water.

1. Compacts require congressional consent to ensure that Congress "maintain[s] ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority." *Cuyler v. Adams*, 449 U.S. 433,

440 (1981). But the mission of an interstate water compact is to insulate States against the exercise of federal authority: the States agree how to apportion interstate water to prevent Congress or federal courts from doing so. Such compacts are also inherently protectionist; by dividing water among States and giving States control over their allocations, States are free to develop their water however they wish. *Sporhase v. Nebraska*, 458 U.S. 941, 956 (1982); Trelease, *supra*, at 349. By ratifying such a compact, Congress authorizes States to administer their water in ways that might ordinarily raise constitutional concerns. *See Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985); Pet. App. 68a.

2. Given the nature of congressional supervision of these compacts, the "clear statement" rule applicable to federal statutes, *e.g.*, *South-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984), is inappropriate. That rule makes sense when discerning Congress's intent in enacting federal laws drafted by Congress.

The "clear statement" rule does not translate to interstate water compacts, even though "a compact when approved by Congress becomes a law of the United States." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). By approving such compacts, Congress blesses inherently protectionist agreements. Congress should not need to add superfluous text reiterating this approval—especially since Congress approved this Compact in 1980 against the baseline assumption that States could freely protect water from out-of-state use. Pet. App. 35a-36a; C. A. Klein, *The Dormant Commerce Clause And Water Export: Toward a New Analytical Paradigm*, 35 Harv. Envtl.

L. Rev. 131, 135 (2011); *accord* 1JA113-120 (Okla. Att'y Gen. Op. No. 77-274 (Feb. 28, 1978)).

Sporhase, decided after the Compact's ratification, is not to the contrary. *Sporhase* involved non-compacted groundwater. The question was whether Congress intended to insulate all groundwater from scrutiny by enacting various laws and compacts that deferred to state regulation of unrelated water. 458 U.S. at 959-60. The unrelated laws and compacts were insufficient to insulate Nebraska's law from dormant Commerce Clause challenge because they did not regulate the groundwater at issue. *Id.*; *accord* Pet. App. 27a-28a.

3. Tarrant now apparently concedes that the Compact authorizes Oklahoma to apply its laws to waters the Compact apportions to Oklahoma. Pet. Br. 46, 50 n.14. If the Compact's general language is clear enough to insulate water apportioned to Oklahoma from scrutiny, the Compact insulates hypothetically unused "excess" Subbasin 5 water under §5.05(b)(1). Nothing in the Compact's text suggests an intent to waive the dormant Commerce Clause selectively. And if that Clause applies only to §5.05(b)(1)—the lone provision involving purportedly "unallocated" water—Oklahoma's laws would be insulated when flows were below 3,000 cfs, but inexplicably void (per Tarrant) once flows triggered §5.05(b)(1).

In any event, the Compact satisfies any "clear statement" rule because "[t]he broad language of [twelve] key Compact provisions" collectively demonstrates Congress's clear consent to state laws that protect in-state water use. Pet. App. 24a, 27a-28a. Section 2.01 permits Oklahoma to "freely administer water rights and uses in accordance with [its] laws." Eight other provisions guarantee States "unrestricted

use of the water" allocated under the Compact. *Id.* at 26a (citing §§4.02(b), 4.03(b), 5.01(b), 5.02(b), 5.04(b), 6.04(b), 7.01(b), and 8.01). And §2.10 provides, "Nothing in this Compact shall be deemed to . . . [i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water." *Id.* at 24a-26a. Taken together, that language resoundingly indicates that within the Red River Basin, States have free rein in administering water rights.

C. A State-Granted Right To Appropriate Water Is Not "Commerce"

The dormant Commerce Clause also does not apply to Oklahoma's decision to grant or withhold rights to divert water, because the clause only bars state laws that discriminate against interstate "commerce." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 401-02 (1994) (O'Connor, J., concurring). To be subject to scrutiny, state laws must regulate activity that is "economic in nature." *United States v. Morrison*, 529 U.S. 598, 613 (2000).

Permits granting the right to appropriate water do not involve economic activity any more than do state-granted marriage licenses or parking permits. Oklahoma streamwater is "public water . . . subject to appropriation for the benefit and welfare of the people of the state." Okla. Stat. tit. 60, §60. Oklahoma controls all initial appropriations, and grants appropriative rights to those who put the water to beneficial use. *Id.* tit. 82, §§105.2(A), 105.9. Like other permits, Oklahoma grants that right for free (subject only to a nominal processing fee). And until water has been "reduced to possession," it has not been transformed into a "commodity . . . subject to sale. . . and a subject of intrastate commerce and

interstate commerce." *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911); *see Sporhase*, 458 U.S. at 950; *cf. id.* at 963 (Rehnquist, J., dissenting).

A State's decision as to whom it will grant an initial right to appropriate streamwater also differs materially from a State's power to limit the commercial market for water rights, in which users of State-granted water permits sell water they have extracted or diverted.[19] Only the latter involves commerce. *Sporhase* is consistent with this distinction. In Nebraska, the right to own groundwater belongs to the property-owner whose land abuts groundwater. *Sporhase* involved a State's ability to prevent right-holders from transferring extracted groundwater out-of-state. 458 U.S. at 944, 949-52, 957. *Sporhase* did not address the State's recognition of the initial ownership right. Trelease, *supra*, at 351.

* * * * *

Neither the Compact nor the Constitution embodies the Robin Hood theory of water rights advanced by Tarrant and its *amici*. Texas had twenty years to bargain for a right to divert water from within other States—but the Compact's text and drafting history make clear that Texas never did so, and that the other States never would have consented to such an extraordinary right. Texas had thirty more years to mention or assert a right the

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[19] North Texas's attempted 2002 purchase of Subbasin 5 water involved the commercial market. Oklahoma planned to permit an Oklahoma entity to divert the water. That entity would deliver the water to North Texas, which would have paid for receipt of guaranteed quantities. *Draft Inter-Regional Water Supply Contract Between STICC and NTWA* (Feb. 19, 2002), http://tinyurl.com/NTWAContract.

Compact purportedly granted through silence. Tarrant had six years of litigation, discovery, and Texas's blessing to pursue its cross-border theory. That Tarrant has yet to detect any proof that the States agreed to or relied on any cross-border right is proof enough that no such right exists.

CONCLUSION

The judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

Public Law 96–564, December 22, 1980, 94 Stat. 3305

96th Congress – S. 2227

An Act

To grant the consent of the United States to the Red River Compact among the States of Arkansas, Louisiana, Oklahoma, and Texas.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. The consent of Congress is hereby given to the Red River Compact among the States of Arkansas, Louisiana, Oklahoma, and Texas, of May 12, 1978, as ratified by the States of Arkansas, Louisiana, Oklahoma, and Texas, as follows:

PREAMBLE

The States of Arkansas, Louisiana, Oklahoma, and Texas, pursuant to the acts of their respective Governors or legislatures, or both, being moved by considerations of interstate comity, have resolved to compact with respect to the water of the Red River and its tributaries. By Act of Congress, Public Law No. 346 (84th Congress, First Session), the consent of the United States has been granted for said States to negotiate and enter into a compact providing for an equitable apportionment of such water; and pursuant to that Act the President has designated the representative of the United States.

Further, the consent of Congress has been given for two or more States to negotiate and enter into agreements relating to water pollution control by the provisions of the Federal Water Pollution Control Act (Public Law 92-500, 33 U.S.C. 1251 et seq.).

The Signatory States acting through their duly authorized Compact Commissioners, after several years of negotiations, have agreed to an equitable apportionment of the water of the Red River and its tributaries and do hereby submit and recommend that this compact be adopted by the respective legislatures and approved by Congress as hereinafter set forth:

ARTICLE I

PURPOSES

Section 1.01. The principal purposes of this Compact are:

(a) To promote interstate comity and remove causes of controversy between each of the affected states by governing the use, control and distribution of the interstate water of the Red River and its tributaries;

(b) To provide an equitable apportionment among the Signatory States of the water of the Red River and its tributaries;

(c) To promote an active program for the control and alleviation of natural deterioration and pollution of the water of the Red River Basin and to provide for enforcement of the laws related thereto;

(d) To provide the means for an active program for the conservation of water, protection of lives and property from floods, improvement of water quality, development of navigation and regulation of flows in the Red River Basin; and

(e) To provide a basis for state or joint state planning and action by ascertaining and identifying each state's share in the interstate water of

the Red River Basin and the apportionment thereof.

ARTICLE II

GENERAL PROVISIONS

Section 2.01. Each Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state. Each state may freely administer water rights and uses in accordance with the laws of that state, but such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact.

Section 2.02. The use of water by the United States in connection with any individual Federal project shall be in accordance with the Act of Congress authorizing the project and the water shall be charged to the state or states receiving the benefit therefrom.

Section 2.03. Any Signatory State using the channel of Red River or its tributaries to convey stored water shall be subject to an appropriate reduction in the amount which may be withdrawn at the point of removal to account for transmission losses.

Section 2.04. The failure of any state to use any portion of the water allocated to it shall not constitute relinquishment or forfeiture of the right to such use.

Section 2.05. Each Signatory State shall have the right to:

(a) Construct conservation storage capacity for the impoundment of water allocated by this Compact;

(b) Replace within the same area any storage capacity recognized or authorized by this Com-

pact made unusable by any cause, including losses due to sediment storage;

(c) Construct reservoir storage capacity for the purposes of flood and sediment control as well as storage of water which is either imported or is to be exported if such storage does not adversely affect the delivery of water apportioned to any other Signatory State; and

(d) Use the bed and banks of the Red River and its tributaries to convey stored water, imported or exported water, and water apportioned according to this Compact.

Section 2.06. Signatory States may cooperate to obtain construction of facilities of joint benefits to such states.

Section 2.07. Nothing in this Compact shall be deemed to impair or affect the powers, rights, or obligations of the United States, or those claiming under its authority, in, over and to water of the Red River Basin.

Section 2.08. Nothing in this Compact shall be construed to include within the water apportioned by this Compact any water consumed in each state by livestock or for domestic purposes: Provided, however, the storage of such water is in accordance with the laws of the respective states but any such impoundment shall not exceed 200 acre-feet, or such smaller quantity as may be provided for by the laws of each state.

Section 2.09. In the event any state shall import water into the Red River Basin from any other river basin, the Signatory State making the importation shall have the use of such imported water.

Section 2.10. Nothing in this Compact shall be deemed to:

(a) Interfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, not inconsistent with its obligations under this Compact;

(b) Repeal or prevent the enactment of any legislation or the enforcement of any requirement by any Signatory State imposing any additional conditions or restrictions to further lessen or prevent the pollution or natural deterioration of water within its jurisdiction; provided nothing contained in this paragraph shall alter any provision of this Compact dealing with the apportionment of water or the rights thereto; or

(c) Waive any state's immunity under the Eleventh Amendment of the Constitution of the United States, or as constituting the consent of any state to be sued by its own citizens.

Section 2.11. Accounting for apportionment purposes on interstate streams shall not be mandatory under the terms of the Compact until one or more affected states deem the accounting necessary.

Section 2.12. For the purposes of apportionment of the water among the Signatory States, the Red River is hereby divided into the following major subdivision:

(a) Reach I—the Red River and tributaries from the New Mexico–Texas State boundary to Denison Dam;

(b) Reach II—the Red River from Denison Dam to the point where it crosses the Arkansas–

Louisiana state boundary and all tributaries which contribute to the flow of the River within this reach;

(c) Reach III—the tributaries west of the Red River which cross the Texas–Louisiana state boundary, the Arkansas–Louisiana state boundary, and those which cross both the Texas–Arkansas state boundary and the Arkansas–Louisiana state boundary;

(d) Reach IV—the tributaries east of the Red River in Arkansas which cross the Arkansas–Louisiana state boundary; and

(e) Reach V—that portion of the Red River and tributaries in Louisiana not included in Reach III or in Reach IV.

Section 2.13. If any part or application of this Compact shall be declared invalid by a court of competent jurisdiction, all other severable provisions and applications of this Compact shall remain in full force and effect.

Section 2.14. Subject to the availability of water in accordance with this Compact, nothing in this Compact shall be held or construed to alter, impair, or increase, validate, or prejudice any existing water right or right of water use that is legally recognized on the effective date of this Compact by either statutes or courts of the Signatory State within which it is locaed.

ARTICLE III

DEFINITIONS

Section 3.01. In this Compact:

(a) The States of Arkansas, Louisiana, Oklahoma, and Texas are referred to as "Arkansas," "Louisiana," "Oklahoma," and "Texas," respectively, or individually as "State" or "Signatory State," or collectively as "States" or "Signatory States."

(b) The term "Red River" means the stream below the crossing of the Texas–Oklahoma state boundary at longitude 100 degrees west.

(c) The term "Red River Basin" means all of the natural drainage area of the Red River and its tributaries east of the New Mexico–Texas state boundary and above its junction with Atchafalaya and Old Rivers.

(d) The term "water of the Red River Basin" means the water originating in any part of the Red River Basin and flowing to or in the Red River or any of its tributaries.

(e) The term "tributary" means any stream which contributes to the flow of the Red River.

(f) The term "interstate tributary" means a tributary of the Red River, the drainage area of which includes portions of two or more Signatory States.

(g) The term "intrastate tributary" means a tributary of the Red River, the drainage area of which is entirely within a single Signatory State.

(h) The term "Commission" means the agency created by Article IX of this Compact for the administration thereof.

(i) The term "pollution" means the alteration of the physical, chemical or biological characteristics of water by the acts or instrumentalities of man which create or are likely to result in a material and adverse effect upon human beings, domestic or wild animals, fish and other aquatic life, or adversely affect any other lawful use of such water; *provided*, that for the purpose of this Compact, "pollution" shall not mean or include "natural deterioration."

(j) The term "natural deterioration" means the material reduction in the quality of water resulting from the leaching of solubles from the soils and rocks through or over which the water flows naturally.

(k) The term "designated water" means water released from storage, paid for by non-Federal interests, for delivery to a specific point of use or diversion.

(l) The term "undesignated water" means all water released from storage other than "designated water."

(m) The term "conservation storage capacity" means that portion of the active capacity of reservoirs available for the storage of water for subsequent beneficial use, and it excludes any portion of the capacity of reservoirs allocated solely to flood control and sediment control, or either of them.

(n) The term "runoff" means both the portion of precipitation which runs off the surface of a drainage area and that portion of the precipitation that enters the streams after passing through the portions of the earth.

ARTICLE IV

APPORTIONMENT OF WATER—REACH I

OKLAHOMA—TEXAS

Subdivision of Reach I and Apportionment of Water Therein

Reach I of the Red River is divided into topographic subbasins, with the water therein allocated as follows:

Section 4.01. Subbasin 1—Interstate streams-Texas.

(a) This includes the Texas portion of Buck Creek, Sand (lebos) Creek, Salt Fork Red River, Elm Creek, North Fork Red River, Sweetwater Creek, and Washita River, together with all their tributaries in Texas which lie west of the 100th Meridian.

(b) The annual flow within this subbasin is hereby apportioned sixty (60) percent to Texas and forty (40) percent to Oklahoma.

Section 4.02. Subbasin 2—Intrastate and Interstate streams—Oklahoma.

(a) This subbasin is composed of all tributaries of the Red River in Oklahoma and portions thereof upstream to the Texas-Oklahoma state boundary at longitude 100 degrees west, beginning from Denison Dam and upstream to and including Buck Creek.

(b) The State of Oklahoma shall have free and unrestricted use of the water of this subbasin.

Section 4.03. Subbasin 3—Intrastate streams—Texas.

(a) This includes the tributaries of the Red River in Texas, beginning from Denison Dam and upstream to and including Prairie Dog Town Fork Red River.

(b) The State of Texas shall have free and unrestricted use of the water in this subbasin.

Section 4.04. Subbasin 4—Mainstem of the Red River and Lake Texoma.

(a) This subbasin includes all of Lake Texoma and the Red River beginning at Denison Dam and continuing upstream to the Texas-Oklahoma state boundary at longitude 100 degrees west.

(b) The storage of Lake Texoma and flow from the mainstem of the Red River into Lake Texoma is apportioned as follows:

(1) Oklahoma 200,000 acre-feet and Texas 200,000 acre-feet, which quantities shall include existing allocations and uses; and

(2) Additional quantities in a ratio of fifty (50) percent to Oklahoma and fifty (50) percent to Texas.

Section 4.05. Special Provisions.

(a) Texas and Oklahoma may construct, jointly or in cooperation with the United States, storage or other facilities for the conservation and use of water; provided that any facilities constructed on the Red River boundary between the two states shall not be inconsistent with the Federal legislation authorizing Denison Dam and Reservoir project.

(b) Texas shall not accept for filing, or grant a permit, for the construction of a dam to impound water solely for irrigation, flood control, soil conservation, mining and recovery of minerals, hydroelectric power, navigation, recreation and pleasure, or for any other purpose other than for domestic, municipal, and industrial water supply, on the mainstem of the North Fork Red River or any of its tributaries within Texas above Lugert-Altus Reservoir until the date that imported water, sufficient to meet the municipal and irrigation needs of Western Oklahoma is provided, or until January 1, 2000, whichever occurs first.

ARTICLE V

APPORTIONMENT OF WATER—REACH II ARKANSAS, OKLAHOMA, TEXAS, AND LOUISIANA

Subdivision of Reach II and Allocation of Water Therein

Reach II of the Red River is divided into topographic subbasins, and the water therein is allocated as follows:

Section 5.01. Subbasin 1—Intrastate streams—Oklahoma.

(a) This subbasin includes those streams and their tributaries above existing, authorized and proposed last downstream major damsites, wholly in Oklahoma and flowing into Red River below Denison Dam and above the Oklahoma–Arkansas state boundary. These streams and their tributaries with existing authorized and proposed last downstream major damsites are as follows:

Stream	Site	Ac-ft	Location	
			Latitude	Longitude
Island-Bayou	Albany	85,200	33°31.5' N.	96°11.4' W.
Blue River	Durant	147,000	33°55.5' N.	96°04.2' W.
Boggy River	Boswell	1,243,800	34°01.8' N.	95°45.0' W.
Kiamichi River	Hugo	240,700	34°01.0' N.	95°22.6' W.

(b) Oklahoma is apportioned the water of this subbasin and shall have unrestricted use thereof.

Section 5.02. Subbasin 2—Intrastate streams—Texas.

(a) This subbasin includes those streams and their tributaries above existing authorized or proposed last downstream major damsites, wholly in Texas and flowing into Red River below Denison Dam and above the Texas–Arkansas state boundary. These streams and their tributaries with existing, authorized or proposed last downstream major damsites are as follows:

Stream	Site	Ac-ft	Location	
			Latitude	Longitude
Shawnee Creek	Randall Lake	5,400	33°48.1' N.	96°34.8' W.
Brushy Creek	Valley Lake	15,000	33°38.7' N.	96°21.5' W.
Bois d'Arc Creek	New Bonham Reservoir.	130,600	33°42.9' N.	95°58.2' W.
Coffee Mill Creek	Coffee Mill Lake	8,000	33°44.1' N.	95°58.0' W.
Sandy Creek	Lake Crockett	3,900	33°44.5' N.	96°55.5' W.
Sanders Creek	Pat Mayse	124,500	33°51.2' N.	95°32.9' W.
Pine Creek	Lake Crook	11,911	33°43.7' N.	95°34.0' W.
Big Pine Creek	Big Pine Lake	138,600	33°52.0' N.	95°11.7' W.
Pecan Bayou	Pecan Bayou	625,000	33°41.1' N.	94°58.7' W.
Mud Creek	Liberty Hill	97,700	33°33.0' N.	94°29.3' W.
Mud Creek	KVW Ranch Lakes (3).	3,440	33°34.8' N.	94°27.3' W.

(b) Texas is apportioned the water of this subbasin and shall have unrestricted use thereof.

Section 5.03. Subbasin 3—Interstate Streams—Oklahoma and Arkansas.

(a) This subbasin includes Little River and its tributaries above Millwood Dam.

(b) The State of Oklahoma and Arkansas shall have free and unrestricted use of the water of this subbasin within their respective states, subject, however, to the limitation, that Oklahoma shall allow a quantity of water equal to 40 percent of the total runoff originating below the following existing, authorized or proposed last downstream major damsites in Oklahoma to flow into Arkansas:

Stream	Site	Ac-ft	Location	
			Latitude	Longitude
Little River	Pine Creek	70,500	34°06.8' N	95°04.9' W.
Glover Creek	Lukfata	258,600	34°08.5' N	94°55.4' W.
Mountain Fork River.	Broken Bow	470,100	34°08.9' N	94°41.2' W.

(c) Accounting will be on an annual basis unless otherwise deemed necessary by the States of Arkansas and Oklahoma.

Section 5.04. Subbasin 4—Interstate streams—Texas and Arkansas.

(a) This subbasin shall consist of those streams and their tributaries above existing, authorized or proposed last downstream major damsites, originating in Texas and crossing the Texas–Arkansas state boundary before flowing into the Red River in Arkansas. These streams and their tributaries with existing, authorized or proposed last downstream major damsites are as follows:

Stream	Site	Ac-ft	Location	
			Latitude	Longitude
McKinney Bayou Trib.	Bringle Lake	3,052	33°30.6' N	94°06.2' W.
Barkman Creek	Barkman Reservoir.	15,900	33°29.7' N	94°10.3' W.
Sulphur River	Texarkana	386,900	33°18.3' N	94°09.6' W.

(b) The State of Texas shall have the free and unrestricted use of the water of this subbasin.

Section 5.05. Subbasin 5—Mainstream of the Red River and tributaries.

(a) This subbasin includes that portion of the Red River, together with its tributaries, from Denison Dam down to the Arkansas-Louisiana state boundary, excluding all tributaries included in the other four subbasins of Reach II.

(b) Water within this subbasin is allocated as follows:

(1) The Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas–Louisiana state boundary is 3,000 cubic feet per second or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second.

(2) Whenever the flow of the Red River at the Arkansas-Louisiana state boundary is less than 3,000 cubic feet per second, but more than 1,000 cubic feet per second, the States of Arkansas, Oklahoma, and Texas shall allow to flow into the Red River for delivery to the State of Louisiana a quantity of water equal to 40 percent of the total weekly runoff originating in subbasin 5 and 40 percent of undesignated water flowing into subbasin 5: *Provided, however*, That this requirement shall not be interpreted to require any state to release stored water.

(3) Whenever the flow of the Red River at the Arkansas-Louisiana state boundary falls below 1,000 cubic feet per second, the States of Arkansas, Oklahoma, and Texas shall allow a quantity of water equal to all the weekly runoff originating in subbasin 5 and all undesignated water flowing in subbasin 5 within their respective states to flow into the Red River as required to maintain a 1,000 cubic foot per second flow at the Arkansas-Louisiana state boundary.

(c) Whenever the flow at Index, Arkansas, is less than 526 c.f.s., the states of Oklahoma and Texas shall each allow a quantity of water equal to 40 percent of the total weekly runoff originating in subbasin 5 within their respective states to flow into the Red River: *Provided, however*, this provision shall be invoked only at the request of Arkansas, only after Arkansas has ceased all diversions from the Red River itself in Arkansas above Index, and only if the provisions of Subsections 5.05(b) (2) and (3) have not caused a limitation of diversions in subbasin 5.

(d) No state guarantees to maintain a minimum low flow to a downstream state.

Section 5.06. Special Provisions.

(a) Reservoirs within the limits of Reach II, subbasin 5, with a conservation storage capacity of 1,000 acre feet or less in existence or authorized on the date of the Compact pursuant to the rights and privileges granted by a Signatory State authorizing such reservoirs, shall be exempt from the provisions of Section 5.05; provided, if any right to store water in, or use water from, an existing exempt reservoir expires or is

cancelled after the effective date of the Compact the exemption for such rights provided by this section shall be lost.

(b) A Signatory State may authorize a change in the purpose or place of use of water from a reservoir exempted by subparagraph (a) of this section without losing that exemption, if the quantity of authorized use and storage is not increased.

(c) Additionally, exemptions from the provisions of Section 5.05 shall not apply to direct diversions from Red River to off-channel reservoirs or lands.

ARTICLE VI

APPORTIONMENT OF WATER—REACH III ARKANSAS, LOUISIANA, AND TEXAS

Subdivision of Reach III and Allocation of Water Therein

Reach III of the Red River is divided into topographic subbasins, and the water therein allocated, as follows:

Section 6.01. Subbasin 1—Interstate streams—Arkansas and Texas.

(a) This subbasin includes the Texas portion of those streams crossing the Arkansas–Texas state boundary one or more times and flowing through Arkansas into Cypress Creek-Twelve Mile Bayou watershed in Louisiana.

(b) Texas is apportioned sixty (60) percent of the runoff of this subbasin and shall have unrestricted use thereof; Arkansas is entitled to forty (40) percent of the runoff of this subbasin.

Section 6.02. Subbasin 2—Interstate streams—Arkansas and Louisiana.

(a) This subbasin includes the Arkansas portion of those streams flowing from Subbasin 1 into Arkansas, as well as other streams in Arkansas which cross the Arkansas-Louisiana state boundary one or more times and flow into Cypress Creek-Twelve Mile Bayou watershed in Louisiana.

(b) Arkansas is apportioned sixty (60) percent of the runoff of this subbasin and shall have unrestricted use thereof; Louisiana is entitled to forty (40) percent of the runoff of this subbasin.

Section 6.03. Subbasin 3—Interstate streams—Texas and Louisiana.

(a) This subbasin includes the Texas portion of all tributaries crossing the Texas-Louisiana state boundary one or more times and flowing into Caddo Lake, Cypress Creek-Twelve Mile Bayou or Cross Lake, as well as the Louisiana portion of such tributaries.

(b) Texas and Louisiana within their respective boundaries shall each have the unrestricted use of the water of this subbasin subject to the following allocation:

(1) Texas shall have the unrestricted right to all water above Marshall, Lake O' the Pines, and Black Cypress damsites; however, Texas shall not cause runoff to be depleted to a quantity less than that which would have occurred with the full operation of Franklin County, Titus County, Ellison Creek, Johnson Creek, Lake O' the Pines, Marshall, and Black Cypress Reservoirs constructed, and those

other impoundments and diversions existing on the effective date of this Compact. Any depletions of runoff in excess of the depletions described above shall be charged against Texas' apportionment of the water in Caddo Reservoir.

(2) Texas and Louisiana shall each have the unrestricted right to use fifty (50) percent of the conservation storage capacity in the present Caddo Lake for the impoundment of water for state use, subject to the provision that supplies for existing uses of water from Caddo Lake, on date of Compact, are not reduced.

(3) Texas and Louisiana shall each have the unrestricted right to fifty (50) percent of the conservation storage capacity of any future enlargement of Caddo Lake, provided, the two states may negotiate for the release of each state's share of the storage space on terms mutually agreed upon by the two states after the effective date of this Compact.

(4) Inflow to Caddo Lake from its drainage area downstream from Marshall, Lake O' the Pines, and Black Cypress damsites and downstream from other last downstream dams in existence on the date of the signing of the Compact document by the Compact Commissioners, will be allowed to continue flowing into Caddo Lake except that any manmade depletions to this inflow by Texas will be subtracted from the Texas share of the water in Caddo Lake.

(c) In regard to the water of interstate streams which do not contribute to the inflow to Cross Lake or Caddo Lake, Texas shall have the

unrestricted right to divert and use this water on the basis of a division of runoff above the state boundary of sixty (60) percent to Texas and forty (40) percent to Louisiana.

(d) Texas and Louisiana will not construct improvements on the Cross Lake watershed in either state that will affect the yield of Cross Lake; provided, however, this subsection shall be subject to the provisions of Section 2.08.

Section 6.04. Subbasin 4—Intrastate streams—Louisiana.

(a) This subbasin includes that area of Louisiana in Reach III not included within any other subbasin.

(b) Louisiana shall have free and unrestricted use of the water of this subbasin.

ARTICLE VII

APPORTIONMENT OF WATER—REACH IV ARKANSAS AND LOUISIANA

Subdivision of Reach IV and Allocation of Water Therein

Reach IV of the Red River is divided into topographic subbasins, and the water therein allocated as follows:

Section 7.01. Subbasin 1—Intrastate streams—Arkansas.

(a) This subbasin includes those streams and their tributaries above last downstream major damsites originating in Arkansas and crossing the Arkansas–Louisiana state boundary before flowing into the Red River in Louisiana. Those major last downstream damsites are as follows:

Stream	Site	Ac-ft	Location	
			Latitude	Longitude
Ouachita River	Lake Catherine	19,000	34°26.6' N	93°01.6' W.
Caddo River	DeGray Lake	1,377,000	34°13.2' N	93°06.6' W.
Little Missouri River.	Lake Greeson	600,000	34°08.9' N	93°42.9' W.
Alum Fork, Saline River.	Lake Winona	63,264	32°47.8' N	92°51.0' W.

(b) Arkansas is apportioned the waters of this subbasin and shall have unrestricted use thereof.

Section 7.02. Subbasin 2—Interstate Streams—Arkansas and Louisiana.

(a) This subbasin shall consist of Reach IV less subbasin 1 as defined in Section 7.01(a) above.

(b) The State of Arkansas shall have free and unrestricted use of the water of this reach subject to the limitation that Arkansas shall allow a quantity of water equal to forty (40) percent of the weekly runoff originating below or flowing from the last downstream major damsite to flow into Louisiana. Where there are no designated last downstream damsites, Arkansas shall allow a quantity of water equal to forty (40) percent of the total weekly runoff originating above the state boundary to flow into Louisiana. Use of water in this subbasin is subject to low flow provisions of subparagraph 7.03(b).

Section 7.03. Special Provisions.

(a) Arkansas may use the beds and banks of segments of Reach IV for the purpose of conveying its share of water to designated downstream diversions.

(b) The State of Arkansas does not guarantee to maintain a minimum low flow for Louisiana in Reach IV. However, on the following streams

when the use of water in Arkansas reduces the flow at the Arkansas–Louisiana state boundary to the following amounts:

(1) Ouachita–780 cfs

(2) Bayou Bartholomew–80 cfs

(3) Boeuf River–40 cfs

(4) Bayou Macon–40 cfs

the State of Arkansas pledges to take affirmative steps to regulate the diversions of runoff originating or flowing into Reach IV in such a manner as to permit an equitable apportionment of the runoff as set out herein to flow into the State of Louisiana. In its control and regulation of the water of Reach IV any adjudication or order rendered by the State of Arkansas or any of its instrumentalities or agencies affecting the terms of this Compact shall not be effective against the State of Louisiana nor any of its citizens or inhabitants until approved by the Commission.

ARTICLE VIII

APPORTIONMENT OF WATER—REACH V

Section 8.01. Reach V of the Red River consists of the mainstem Red River and all of its tributaries lying wholly within the State of Louisiana. The State of Louisiana shall have free and unrestricted use of the water of this subbasin.

ARTICLE IX

ADMINISTRATION OF THE COMPACT

Section 9.01. There is hereby created an interstate administrative agency to be known as the "Red River Compact Commission," hereinafter called the "Commission." The Commission shall be composed of two

representatives from each Signatory State who shall be designated or appointed in accordance with the laws of each state, and one Commissioner representing the United States, who shall be appointed by the President. The Federal Commissioner shall be the Chairman of the Commission but shall not have the right to vote. The failure of the President to appoint a Federal Commissioner will not prevent the operation or effect of this Compact, and the eight representatives from the Signatory States will elect a Chairman for the Commission.

Section 9.02. The Commission shall meet and organize within 60 days after the effective date of this Compact. Thereafter, meetings shall be held at such times and places as the Commission shall decide.

Section 9.03. Each of the two Commissioners from each state shall have one vote: *Provided, however,* That if only one representative from a state attends he is authorized to vote on behalf of the absent Commissioner from that state. Representatives from three states shall constitute a quorum. Any action concerned with administration of this Compact or any action requiring compliance with specific terms of this Compact shall require six concurring votes. If a proposed action of the Commission affects existing water rights in a State, and that action is not expressly provided for in this Compact, eight concurring votes shall be required.

Section 9.04.

(a) The salaries and personal expenses of each state's representative shall be paid by the government that it represents, and the salaries and personal expenses of the Federal Commissioner will be paid for by the United States.

(b) The Commission's expenses for any additional stream flow gaging stations shall be equitably apportioned among the states involved in the reach in which the stream flow gaging stations are located.

(c) All other expenses incurred by the Commission shall be borne equally by the Signatory States and shall be paid by the Commission out of the "Red River Compact Commission Fund." Such Fund shall be initiated and maintained by equal payments of each state into the fund. Disbursement shall be made from the fund in such manner as may be authorized by the Commission. Such fund shall not be subject to audit and accounting procedures of the State; however, all receipts and disbursements of the fund by the Commission shall be audited by a qualified independent public accountant at regular intervals, and the report of such audits shall be included in and become a part of the annual report of the Commission. Each State shall have the right to make its own audit of the accounts of the Commission at any reasonable time.

ARTICLE X

POWERS AND DUTIES OF THE COMMISSION

Section 10.01. The Commission shall have the power to:

(a) Adopt rules and regulations governing its operation and enforcement of the terms of the Compact;

(b) Establish and maintain an office for the conduct of its affairs and, if desirable, from time to time, change its location;

(c) Employ or contract with such engineering, legal, clerical, and other personnel as it may determine necessary for the exercise of its functions under this Compact without regard to the Civil Service Laws of any Signatory State; provided that such employees shall be paid by and be responsible to the Commission and shall not be considered employees of any Signatory State;

(d) Acquire, use and depose of such real and personal property as it may consider necessary;

(e) Enter into contracts with appropriate State or Federal agencies for the collection, correlation, and presentation of factual data, for the maintenance of records and for the preparation of reports;

(f) Secure from the head of any department or agency of the Federal or State government such information as it may need or deem to be useful for carrying out its functions and as may be available to or procurable by the department or agency to which the request is addressed; provided such information is not privileged and the department or agency is not precluded by law from releasing same;

(g) Make findings, recommendations, or reports in connection with carrying out the purposes of this compact, including, but not limited to, a finding that a Signatory State is or is not in violation of any of the provisions of this Compact. The Commission is authorized to make such investigations and studies, and to hold such hearings as it may deem necessary for said purposes. It is authorized to make and file official certified copies of any of its findings, recom-

mendations or reports with such officers or agencies of any Signatory State, or the United States, as may have any interest in or jurisdiction over the subject matter. The making of finds, recommendations, or reports by the Commission shall not be a condition precedent to the instituting or maintaining of any action or proceeding of any kind by a Signatory State in any court or tribunal, or before any agency or officer, for the protection of any right under this Compact or for the enforcement of any of its provisions; and

(h) Print or otherwise reproduce and distribute its proceedings and reports.

Section 10.02. The Commission shall:

(a) Cause to be established, maintained, and operated such stream, reservoir and other gaging stations as are necessary for the proper administration of the Compact;

(b) Cause to be collected, analyzed and reported such information on stream flows, water quality, water storage and such other data as are necessary for the proper administration of the Compact;

(c) Perform all other functions required of it by the Compact and do all things necessary, proper and convenient in the performance of its duties thereunder;

(d) Prepare and submit to the Governor of each of the Signatory States a budget covering the anticipated expenses of the Commission for the following fiscal biennium;

(e) Prepare and submit an annual report to the Governor of each Signatory State and to the

President of the United States covering the activities of the Commission for the preceding fiscal year, together with an accounting of all funds received and expended by it in the conduct of its work;

(f) Make available to the Governor or to any official agency of the Signatory State or to any authorized representative of the United States, upon request, any information within its possession;

(g) Not incur any obligation in excess of the unencumbered balance of its funds, nor pledge the credit of any of the Signatory States; and

(h) Make available to a Signatory State or the United States in any action arising under this Compact; without subpoena, the testimony of any officer or employee of the Commission having knowledge of any relevant facts.

ARTICLE XI

POLLUTION

Section 11.01. The Signatory States recognize that the increase in population and the growth of industrial, agricultural, mining and other activities combined with natural pollution sources may lead to a diminution of the quality of water in the Red River Basin which may render the water harmful or injurious to the health and welfare of the people and impair the usefulness or public enjoyment of the water for beneficial purposes, thereby resulting in adverse social, economic, and environmental impacts.

Section 11.02. Although affirming the primary duty and responsibility of each Signatory State to take appropriate action under its own laws to prevent, diminish, and regulate all pollution sources within its

boundaries which adversely affect the water of the Red River Basin, the states recognize that the control and abatement of the naturally occurring salinity sources as well as, under certain circumstances, the maintenance and enhancement of the quality of water in the Red River Basin may require the cooperative action of all states.

Section 11.03. The Signatory States agree to cooperate with agencies of the United States to devise and effectuate means of alleviating the natural deterioration of the water of the Red River Basin.

Section 11.04. The Commission shall have the power to cooperate with the United States, the Signatory States and other entities in programs for abating and controlling pollution and natural deterioration of the water of the Red River Basin, and to recommend reasonable water quality objectives to the states.

Section 11.05. Each Signatory State agrees to maintain current records of waste discharges into the Red River Basin and the type and quality of such discharges, which records shall be furnished to the Commission upon request.

Section 11.06. Upon receipt of a complaint from the Governor of a Signatory State that the interstate water of the Red River Basin in which it has an interest are being materially and adversely affected by pollution and that the state in which the pollution originates has failed after reasonable notice to take appropriate abatement measures, the Commission shall make such findings as are appropriate and thereafter provide such findings to the Governor of the state in which such pollution originates and request appropriate corrective action. The Commission, however, shall not take any action with respect

to pollution which adversely affects only the state in which such pollution originates.

Section 11.07. In addition to its other powers set forth under this Article, the Commission shall have the authority, upon receipt of six concurring votes, to utilize applicable Federal statutes to institute legal action in its own name against the person or entity responsible for interstate pollution problems; provided, however, sixty (60) days before initiating legal action the Commission shall notify the Governor of the state in which the pollution source is located to allow that state an opportunity to initiate action in its own name.

Section 11.08. Without prejudice to any other remedy available to the Commission, or any Signatory State, any state which is materially and adversely affected by the pollution of the water of the Red River Basin by pollution originating in another Signatory State may institute a suit against any individual, corporation, partnership, or association, or against any Signatory State or political or governmental subdivision thereof, or against any officer, agency, department, bureau, district or instrumentality of or in any Signatory State contributing to such pollution in accordance with applicable Federal statutes. Nothing herein shall be construed as depriving any persons of any rights of action relating to pollution which such person would have if this Compact had not been made.

ARTICLE XII

TERMINATION AND AMENDMENT OF COMPACT

Section 12.01. This Compact may be terminated at any time by appropriate action of the legislatures of all of the four Signatory States. In the event of such

termination, all rights established under it shall continue unimpaired.

Section 12.02. This Compact may be amended at any time by appropriate action of the legislatures of all Signatory States that are affected by such amendment. The consent of the United States Congress must be obtained before any such amendment is effective.

ARTICLE XIII

RATIFICATION AND EFFECTIVE DATE OF COMPACT

Section 13.01. Notice of ratification of this Compact by the legislature of each Signatory State shall be given by the governor thereof to the governors of each of the other Signatory States and to the President of the United States. The President is hereby requested to give notice to the governors of each of the Signatory States of the consent of this Compact by the Congress of the United States.

Section 13.02. This Compact shall become effective, binding and obligatory when, and only when:

(a) It has been duly ratified by each of the Signatory States; and

(b) It has been consented to by an Act of the Congress of the United States,

which act provides that:

Any other statute of the United States to the contrary notwithstanding, in any case or controversy:

which involves the construction or application of this Compact; in which one or more of the Signatory States to this Compact is a plaintiff or plaintiffs; and which is within the judicial power

of the United States as set forth in the Constitution of the United States;

and without any requirement, limitation or regard as to the sum or value of the matter in controversy, or of the place of residence or citizenship of, or of the nature, character or legal status of, any of the other proper parties plaintiff or defendant in such case or controversy:

The consent of Congress is given to name and join the United States as a party defendant or otherwise in any such case or controversy in the Supreme Court of the United States if the United States is an indispensable party thereto.

Section 13.03. The United States District Courts shall have original jurisdiction (concurrent with that of the Supreme Court of the United States, and concurrent with that of any other Federal or state court, in matters in which the Supreme Court, or other court has original jurisdiction) of any case or controversy involving the application or construction of this Compact; that said jurisdiction shall include, but not be limited to, suits between Signatory States; and that the venue of such case or controversy may be brought in any judicial district in which the acts complained of (or any portion thereof) occur.

SIGNED AND APPROVED on the 12th day of May, 1978 at Denison Dam.

FOR ARKANSAS:

John P. Saxton
Commissioner

FOR LOUISIANA:

Arthur R. Theis
Commissioner

FOR OKLAHOMA:

Orville B. Saunders
Commissioner

FOR TEXAS:

Fred Parkey
Commissioner

FOR UNITED STATES
OF AMERICA:

R. C. Marshall, Major General
Representative

Section 2. In order to carry out the purposes of this Act, and the purposes of article XIII of this compact consented to by Congress by this Act, the congressional consent to this compact includes and expressly gives the consent of Congress to have the United States of America named and joined as a party defendant or otherwise in the United States Supreme Court or in a district court with concurrent jurisdiction in matters in which the Supreme Court has original jurisdiction, in any case or controversy involving the construction or application of this Compact in which one or more of the Signatory States to this Compact is a plaintiff, and which is within the judicial power of the United States as set forth in the Constitution of the United States, if the United States of America is an indispensable party and without any requirement, limitation or regard as to the sum or value of the matter in controversy, or of the place of residence or citizenship of, or of the nature, character or legal status of, any of the other proper parties plaintiff or defendant in such case or controversy.

Section 3. The right to alter, amend, or repeal this Act is expressly reserved.

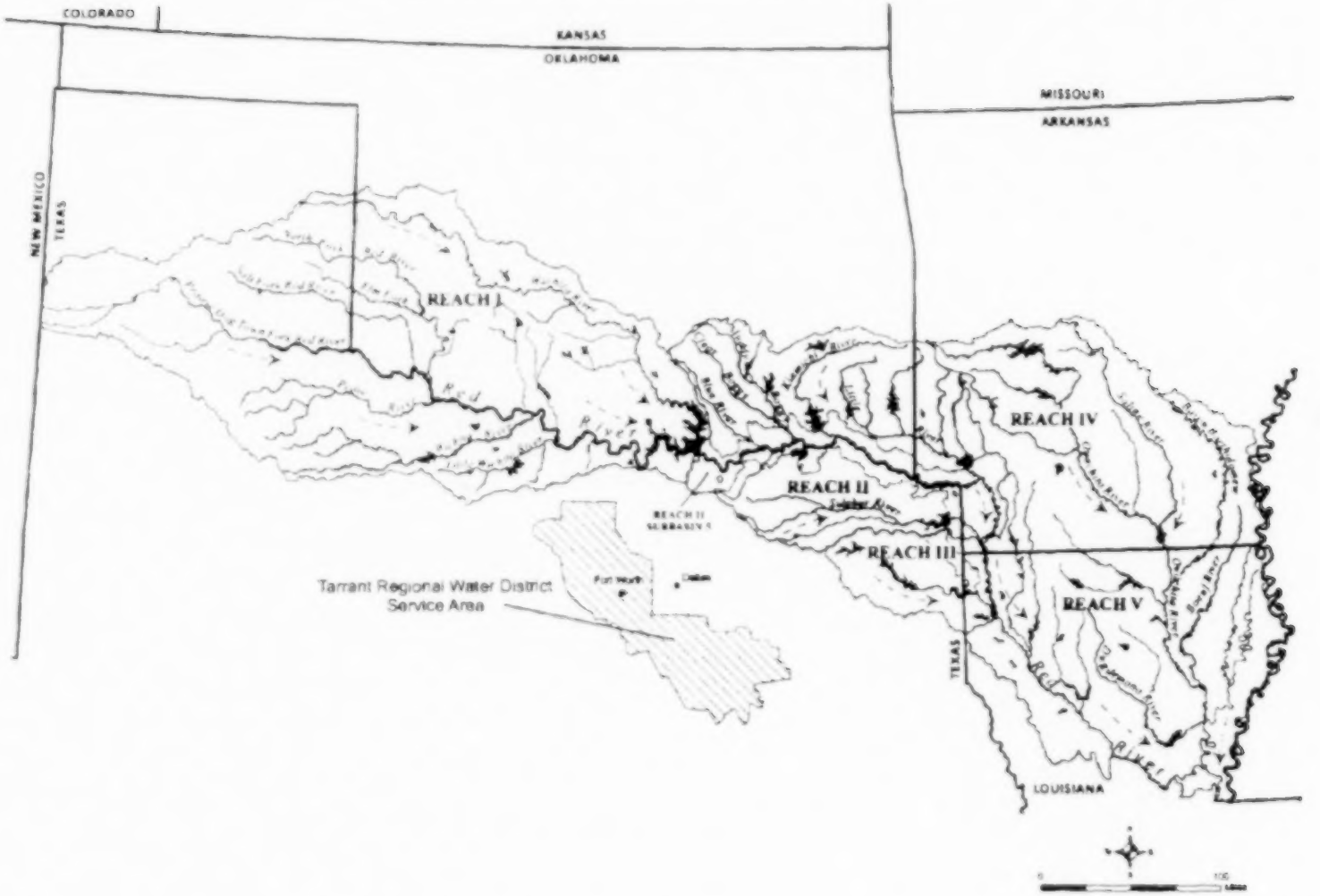
Section 4. The United States District Courts shall have original jurisdiction (concurrent with that of the Supreme Court of the United States, and concurrent with that of any other Federal or state court, in matters in which the Supreme Court, or other court has original jurisdiction) of any case or controversy

involving the application or construction of this Compact; that said jurisdiction shall include, but not be limited to, suits between Signatory States; and that the venue of such case or controversy may be in any judicial district in which the acts complained of (or any portion thereof) occur.

Approved December 22, 1980.

Map 1: Reach II of the Red River Compact

Map 2: All Reaches of the Red River Compact



REPLY BRIEF

No. 11-889

In the Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,

Petitioner,

v.

RUDOLF JOHN HERRMANN ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents' brief is strikingly candid in one respect: It recognizes that respondents' position cannot be squared with the plain language of the Compact. Respondents thus urge the Court to read into the Compact language that the drafters considered and *omitted* because, respondents intuit, the drafters must have thought the missing words "too obvious" for "elaboration." As for language the Compact *does* use, respondents urge the Court to ignore it as "superfluous." Resp. Br. 39. Respondents' ultimate position, accordingly, is that the Court should not attribute "talismanic significance" to the operative language of the Compact. Resp. Br. 41.

To say the least, that is a peculiar approach to the interpretation of any written instrument, let alone one that was crafted over twenty-four years of painstaking negotiations. But it is no mystery why respondents urge the Court to look at everything *but* the Compact's language. As the United States confirms, respondents' approach—under which Texas' "equal right[] to the use" of excess Subbasin 5 water does not actually entitle Texas to an equal share of that water—cannot be squared with the Compact's plain text, structure, negotiating history, or common sense. It therefore should be rejected.

A. Respondents' approach is inconsistent with the Compact's plain text.

1. Respondents offer their current reading of the Compact for the first time in their merits brief to this Court. They have abandoned their prior view that Section 5.05(b)(1) allows each signatory State to use the excess water "within its borders" up to the "amount equal to what is used by other states." Opp.

31. They also no longer defend the court of appeals' somewhat different view that Section 5.05(b)(1) authorizes each State to "use up to 25 percent of the excess water [located] in its state." Pet. App. 43a. Instead, respondents now claim (at 34-35) that Section 5.05(b)(1) gives "each State an *equal opportunity* to make beneficial use of [all] 'excess' water *in their State*." (Emphasis added). That reading is no better than their earlier ones.

In two independent respects, respondents' reading deviates from what the Compact says. *First*, the formulation that respondents offer ("equal *opportunity*") would mean that the drafters gave each State no more than a "chance" to use Subbasin 5's surplus when "circumstances" permit. See *Webster's Third New International Dictionary* 1583 (1986). The drafters, however, gave the States "equal *rights*" to the surplus water, connoting a "legally enforceable claim" or an "interest" that "is due to" the States by "legal guarantee," regardless of circumstance. *Black's Law Dictionary* 1436 (9th ed. 2009). Under ordinary usage, "equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5" (what the Compact actually says) simply does not mean "equal opportunity to use the excess water in your State" (what respondents wish it said).

Second, as this last point suggests, respondents' reading of Section 5.05(b)(1) inserts a state-line qualifier that the drafters omitted. But it is fundamental that the Court will not "read absent terms into an interstate compact given the federalism and separation-of-powers concerns that would arise were [it] to rewrite an agreement among sovereign States, to which the political branches consented." *Alabama* v. *North Carolina*, 130 S. Ct. 2295, 2312-2313 (2010).

Instead, the Court must enforce the Compact according to its "express terms." *Id.* at 2313. Here, that principle requires rejecting respondents' efforts to rewrite the Compact.

Third, respondents say that Section 5.05(b)(1) language providing that "no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second" "imposes a cap on water use, not a guarantee of an equal share of water." Resp. Br. 34-35; see also *id.* at 37. We agree. It is, instead, the "equal rights" language that grants equal *entitlement* to the waters of Subbasin 5; the "25 percent" language makes clear that, in exercising its "equal rights" to the common pool of water, no State may take more than a one-quarter *share*. That the "25 percent language," taken alone, imposes a "cap" rather than gives a "guarantee" (Resp. Br. 35) is therefore immaterial. As the United States explains (at 19), "*coupled with*" the "equal rights" provision, "[t]he 25% limitation indicates that a purpose of Section 5.05(b)(1) is to allocate to each of the four States an equal one-fourth *share* of the excess water in Reach II, Subbasin 5." (Emphasis added).

2. Respondents' answer to the Compact's language is that the Court should simply ignore it. When an interstate compact allocates water among States, they say, the "notion that States divert water [only] within their [own] borders" and not from the territory of any other State is so "obvious" (Resp. Br. 25, 39) that a state-line limitation must be "assumed" (Resp. Br. 9, 11, 42). In fact, not only are border limitations "too obvious * * * to require elaboration in every provision," but they are wholly "superfluous" when they *are* stated. Resp. Br. 39. According to respondents, therefore, a compact that

includes state-line limitations in some provisions but not in others does so "arbitrarily." Resp. Br. 25.

Needless to say, respondents' unorthodox approach spurns the fundamental rule that an interstate compact, like any other "legal document," must be "construed and applied in accordance with its terms." *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987). See Pet. Br. 26-27. Because "[t]he preeminent canon of statutory interpretation" is the presumption "that [the] legislature says in a statute what it means and means in a statute what it says," the Court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd.* v. *United States*, 541 U.S. 176, 183 (2004). Against this background, two related principles demonstrate that the Compact unambiguously allocates Subbasin 5 water without regard to state lines.

First, when a document includes express terms in one section but omits those terms from another, it is presumed that the drafters "act[ed] intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983). See also *Virginia* v. *Maryland*, 540 U.S. 56, 66-67 (2003). As we showed in our opening brief (at 28-29), that is just what the Compact's drafters did, expressly imposing state-line limitations on some allocations but not on others. Thus, "[t]he parties' inclusion of a state-boundary restriction or requirement in other allocation provisions suggests that no similar restriction was intended for Reach II, Subbasin 5." U.S. Br. 19. That is not to give "talismanic significance to words mentioning borders" (Resp. Br. 41); it is to give them their plain meaning.

Moreover, far from being arbitrary, the drafters acted advisedly when imposing state-line limitations on some, but not on other, Compact provisions. Thus, for example, the *omission* of the limitation from 5.05(b)(2) recognized that users appropriating water across state lines under Section 5.05(b)(1) may continue to do so during times of intermediate flow under (b)(2). It also ensures that when a Texas water user appropriating a portion of Texas's share of Subbasin 5 water from within Oklahoma curtails its use under 5.05(b)(2), that curtailment is credited to Texas. (A state-line limitation in Section 5.05(b)(2) would otherwise mean that Oklahoma were credited for the Texas user's curtailment.) The *inclusion* of the limitation in Section 5.05(b)(3), by contrast, requires each upstream State to ensure that all Subbasin 5 water users within its boundaries curtail their use *entirely*, in which circumstance accounting is irrelevant.[1]

As we explained in our principal brief (at 35-36), moreover, the drafters' decision not to impose a state-line limitation on the States' "equal rights to the use" of excess Subbasin 5 water makes perfect sense. Unlike other subbasins expressly subject to state-line limits, Subbasin 5 consists only of surplus water that the upstream States intend not to use and

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[1] Respondents observe (at 40) that, according to the interpretive comments (1JA30) "the upstream states" must, under (b)(2), allow water to pass "within subbasin 5 within each state." But the words "within each state" simply describe where the water is located; they do not mean that the curtailments made by each States' users must occur in the user's own state.

thus are willing to share.[2] And because Subbasin 5 is relatively narrow (just 10-20 miles wide along the great majority of its length), with abundant water supply, allowance for cross-border transfers was hardly an open-ended invitation to take water from anywhere within the upstream States. Moreover, because downstream flow to Louisiana is guaranteed exclusively from the surplus water of Subbasin 5, not the upstream subbasins, the border-free apportionment ensures that no State bears a disproportionate obligation to Louisiana during low flows.

Second, an equally "cardinal principle of statutory construction" is that statutes should be interpreted, where possible, not to render any language "superfluous, void, or insignificant." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001). Yet respondents expressly declare (at 39) that much of the Compact's language *is* "superfluous." If respondents were right that the drafters simply "understood" (Resp. Br. 18) and "assumed" (Resp. Br. 9, 11, 42) that state-border limitations would apply to all allocations of water—that is, if such limitations were so "obvious" (Resp. Br. 25, 39) that they needed no articulation—the numerous express state-border limitations that the drafters actually placed in the Compact would serve no purpose at all. *E.g.*, 1JA23 (§ 5.03(b)), 1JA25

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[2] Respondents note (at 43) that because excess Subbasin 5 water includes rainfall "originating" in Subbasin 5, not *all* excess water is unused surplus from the upstream subbasins. But rainfall originating in Subbasin 5 is trivial compared with the volume of water flowing into the subbasin. Respondents' only support for their contrary assertion (*ibid.*) is a reference to the monthly flows (not rainfall) of the Clear Boggy Creek, an Oklahoma tributary located wholly in Subbasin 1 (not Subbasin 5).

(§ 5.05(b)(3)), 1JA33 (§ 6.03(b)). It is an insufficient response to this point to posit that the Compact's drafters were simply absent-minded.

B. Respondents' reading cannot be squared with Subbasin 5's structure and purpose.

We explained in our principal brief (at 5-9, 34-37) why the purpose and structure of Reach II and its five subbasins also supports our reading of the Compact. In particular, we showed (at 36-37) that respondents' alternative reading of the Compact would make Subbasin 5 essentially pointless. Respondents offer no response.

We also explained (at 31-33) why any interpretation of Section 5.05(b)(1) that imposes an unspoken state-line limitation on Subbasin 5 would make nonsense of the allocation of excess subbasin water to Louisiana, which, under respondents' territorial approach, has no right to Subbasin 5 water at all.

Respondents answer (at 42-43) that "Louisiana receives Subbasin 5 waters once they flow into Reach V, which is allocated to Louisiana." But that again ignores the Compact's language. Section 5.05(b) expressly allocates equal shares of the "[w]ater *within this subbasin*" to all four States, including Louisiana. 1JA25 (emphasis added). The Compact *separately* grants Louisiana "unrestricted use" of water in Reach V (1JA38 (§ 8.01)), and establishes downstream flow thresholds to assure that sufficient water enters Reach V. In light of that arrangement, it would be a very odd use of language for the drafters to give Louisiana an equal share of water "within this subbasin [5]" if what they had really meant to do was reserve that water for Louisiana's use only after

it no longer *is* "within this subbasin" and instead had entered Reach V.

C. This case is not about the surrender of Oklahoma's sovereignty.

Rather than rely on the Compact's language, respondents and their *amici* appeal principally to "core" principles of "State sovereignty." Resp. Br. 29. Respondents thus assert that "[c]ontrol over waters and land within a State's borders are quintessential elements of State sovereignty" and that "[t]he Compact should not be read to disturb those foundational principles absent express language confirming the States' intent to do so." *Ibid.* See also Br. of Colo. 4-9. That contention substitutes a newly discovered presumption in favor of "sovereignty" for the Tenth Circuit's presumption against preemption, which respondents do not defend. For three reasons, however, respondents' substitute argument is equally wrong.

First, whether or not a presumption against "disturbing" state sovereignty were sensible in other circumstances, it has no application to the interpretation of an interstate compact. As noted in our principal brief (at 40-41) and demonstrated by the United States (at 16-17), the text of a compact itself is the product of the States' exercise of their core sovereign prerogatives. By disregarding the plain terms of the bargain that the States *actually* struck, it is respondents' approach—which, in practice, amounts to a presumption that all interstate water compacts allocate to each signatory State all the water within its respective borders—that disrespects state sovereignty. Reading the Compact to preempt Oklahoma's water export embargo does not treat Oklahoma as having "blithely abdicat[ed]" its "core sovereign powers over the use and administration of in-state water"

(Resp. Br. 29); it simply holds Oklahoma to its agreement. We made that self-evident point before (Pet. Br. 40-41), but respondents offer no response.

Second, our interpretation does not, in any event, abrogate any sovereign prerogative of Oklahoma. A State's "regulat[ion] within its boundaries [of] the appropriation, use, and control of water" (1JA12 (§ 2.10(a)) may well be a traditional state function. But Oklahoma's regulatory authority over the appropriation and use of water within its borders remains intact under our reading of the Compact. As we repeatedly have acknowledged (*e.g.*, Pet. Br. 19), the Compact does not give Texas regulatory authority in Oklahoma; anyone seeking to appropriate water in Oklahoma, *including Tarrant*, must apply to OWRB, obtain a permit, and abide by the terms of the permit and any generally-applicable and nondiscriminatory Oklahoma water-use laws. Where rights-of-way are necessary for pipeline construction, easements will have to be purchased from private landowners or otherwise obtained by exercising eminent domain pursuant to *Oklahoma* law. Okla. Stat. tit. 82, § 105.3 (granting "the right of eminent domain to acquire right-of-way for the storage or conveyance of waters for beneficial use").[3]

Finally, respondents express skepticism that the Compact could be read to authorize other States

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[3] We recognize that Arkansas and Louisiana, as well as the Chickasaw and Choctaw Nations, have filed briefs repeating the same sovereignty theme. But their position is, to put it bluntly, mercenary: They are water-rich and will benefit if Texas (which is water-poor but economically dominant) has to buy water from them, rather than accessing its Subbasin 5 share in Oklahoma. *Amici* have tried to sell water to Tarrant in the past. *E.g.*, 2JA381.

to "invade" Oklahoma's "territory." Resp. Br. 1. Although we would not describe the Compact in such sanguinary terms, the Compact's language in fact does exactly that. Section 2.05(d) expressly permits the other three signatory States to "[u]se the bed and banks of the Red River and its tributaries to convey stored water." 1JA11. The bed and banks of the Red River are in Oklahoma; they are not in Texas. Respondents dismiss this reality with the observation (at 42) that Section 2.05(d) merely "lets States use the Red and its tributaries like a highway, for the sole purpose of *transporting* allocated water." But Texas water users cannot use "the bed and banks of the Red River" as a "highway," or for any other purpose, without *entering* Oklahoma. If that means that Oklahoma has "abdicat[ed its] core sovereign powers" (Resp. Br. 29), the abdication was a voluntary one on Oklahoma's part. See also 1JA11 (§ 2.05(c)) (providing for "storage of water which is either imported or is to be exported").

D. Tarrant's interpretation of the Compact would not impose any new or unusual administrative burdens.

Respondents argue as a fall-back that our reading of Section 5.05(b)(1) would be unworkable, burdensome, and expensive. But their contentions on that score misconstrue the Compact and misrepresent the basics of water administration.

First, respondents are wrong that permitting Texas to take water from Oklahoma "would create a jurisdictional nightmare" because it would be unclear whether the OWRB, a Texas permitting authority, or a combination of both would be responsible for passing on Tarrant's application. Resp. Br. 32. Tarrant's

permit application is subject to approval by the OWRB alone. See Pet. Br. 19.

Second, respondents argue (at 33) that, if permitting responsibility fell to Oklahoma, the OWRB "would face a difficult bind" because it "would not know how much of Texas's 25% 'share' Texans already used." Thus, they hypothesize (*ibid.*), giving a Texas water user a permit to appropriate "could be facilitating a Compact violation" and would require "continual updates from Texas as to how much Subbasin 5 water Texans already used."

There is no reason, however, to think that approval of a *Texas* water user's permit would be any more likely to "facilitate[e] a Compact violation" than would approval of an *Oklahoma* water user's permit. Respondents acknowledge (at 35) that none of the Compact States (including Oklahoma) knows how much it "receives or diverts relative to the total," and that the 25% "cap" (which applies equally to all four States) is enforced "only if a State calls for an accounting." If Tarrant received a permit from OWRB, Oklahoma would no more have to keep track of Texas's Subbasin 5 diversions than it would of its own. Respondents are therefore wrong when they claim (at 38) that, under our reading of Section 5.05(b)(1), "each State would have to monitor extensive data at enormous expense." It is certainly *possible* that a State may someday deem an accounting "necessary" (1JA13 (§ 2.11)), but that is so no matter how this Court reads Section 5.05(b)(1). Respondents ultimately admit as much. Resp. Br. 42.

In any event, an accounting would *not* be "infeasible." Resp. Br. 38. Coordinated accounting would be straightforward, requiring online monitoring of stream gages (see Water Control Data System, Tulsa

District, http://tinyurl.com/Tarrant28 (follow link to "Real-time Gage Data for All Stations")), tracking cumulative diversions permitted by each State (using standard permit records), and providing periodic updates to the Red River Compact Commission. It is commonplace for compact commissions throughout the West to oversee such accountings, without imposing "enormous expense." Resp. Br. 38. *E.g.*, Republican River Compact Admin., *Accounting Procedures & Reporting Requirements* (2002), http://tinyurl.com/Tarrant25.

Finally, respondents assert (at 40-41) that, under our interpretation of the Compact, the "the 3,000 cfs threshold is an on-off switch for borders," and that Tarrant's right to access Texas's share of Subbasin 5 water in Oklahoma "would flicker in and out of existence with a gage reading" as the flow at the Louisiana border fluctuated. That, too, is mistaken.

As we note above (at 9), Tarrant (and every other Texas Subbasin 5 water user) must comply with Sections 5.05(b)(2) and (b)(3) by curtailing water use during times of low flow; the conditions for such curtailment would be detailed by permit. But that is true regardless whether those water users access Texas's share of the Subbasin 5 surplus on the Texas side of the border or the Oklahoma side. The 3,000 cfs threshold has no bearing on the places *where* a water user may appropriate Subbasin 5 water; it is relevant only to the separate question of *when* it may. And on that score, Tarrant has never claimed the right to a "permanent" or inflexible allocation of 310,000 acre-feet per year. See Resp. Br. 28. Tarrant's water right will entitle it to divert *up to* 310,000 acre-feet of the *available* water from the Kiamichi River each year, and will entitle Oklahoma to

require Tarrant to curtail its diversion in full or in part as required by the Compact.[4]

E. The drafting history and course of performance favors Tarrant's reading of the Compact.

Because the Compact is unambiguous, resort to extrinsic evidence is unnecessary. But if that were not so, the evidence strongly favors Tarrant.

1. Respondents acknowledge (at 45-46) that early drafts of the Compact expressly allocated the water of several subbasins, including what later became Reach II, Subbasin 5, according to state lines. They also concede that such language was later *stricken* from Section 5.05(b)(1). Respondents puzzlingly conclude (at 46) that these "revisions" removing the express state-line limitations from Section 5.05(b)(1) are helpful to them. The opposite is true: When the evidence shows that the drafters "considered and rejected" particular language, the courts are not free to re-insert it; the rejection instead must be deemed "deliberate." *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 378 n.13 (2000). That is especially so in this case, where the drafters considered and *retained* the same language elsewhere in the Compact.[5]

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[4] That said, curtailment of major diversions is commonly performed by remote control, meaning—ironically—that curtailments often *do* take place at the a flip of a switch.

[5] Respondents note (at 13) that an early draft of the Compact granted the States "free and unrestricted use" of Subbasin 5 water, which they say "necessarily meant use *within their borders*" because "multiple States cannot have 'free and unrestricted use' of the same water" at the same time. That is incorrect. Multiple herdsmen can simultaneously have free and unrestricted use of "a pasture open to

2. We explained in our opening brief (at 12, 44-46) that the construction of federal "reservoirs in the Kiamichi River Basin" *in Oklahoma* was authorized to provide the water supply *for North Texas*. See S. Doc. No. 145, at 15, 204.[6] We also demonstrated that federal dam authorizing legislation was at the forefront of the Compact drafters' minds. Pet. Br. 46 n.12. Respondents nevertheless say (at 48-49) that our reference to that history is inconsistent with the Compact's allocation of Subbasin 1 water to Oklahoma, and does not otherwise indicate Subbasin 5 was a "consolation prize." That misses the point, which is that Oklahoma and Texas were contemplating, and the federal government *affirmatively authorized*, cross-border transfers of water during the same period that the Compact was being negotiated. Our reading of the Compact is consistent with that history; respondents' is not. And it is the Corps, not Oklahoma, that controls releases from federal dams that flow into Subbasin 5. See 33 C.F.R. § 222.5.

3. We also noted (at 9 & n.5) that engineering reports from the drafting process demonstrate that the drafters knew that Texas could not access its 25% share of Subbasin 5 water within its own bor-

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all" (Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243, 1244 (1968)); so, too, multiple States can simultaneously have free and unrestricted use of a common pool of water open to all. As respondents acknowledge (at 46), the drafters solved the anticipated tragedy-of-the-commons problem, *not* by imposing a state-line limitation, but by imposing a 25% cap. In any event, "free and unrestricted use" is not the language that the drafters ultimately adopted.

[6] Respondents and their *amici* suggest otherwise. See Resp. Br. 6, 49; Br. of Okla. City 9-11. But they fail to mention that the Public Health Service studies they cite were *rejected* by the Corps in Senate Document 145 (at 26).

ders. Respondents assert vaguely (at 48) that they "dispute those calculations" and that their own "calculations show that Texas's share of 'excess' Subbasin 5 water is at least 29%." Respondents tellingly decline to explain the data underlying that implausible figure, citing just one page of the engineering report concerning a creek located within Reach II, *Subbasin 1*.[7] Regardless, respondents' own arithmetic proves our broader point: The drafters understood that Subbasin 5's excess is not distributed geographically among all four States in perfect 25% shares, meaning that at least one State necessarily would have to cross state lines to access its full share.[8]

4. Oklahoma points to other interstate water compacts (at 30-31), claiming that "[n]o interstate water compact allows one State to divert water from another State absent express language authorizing cross-border diversions." That is demonstrably false. Article V of the Upper Niobrara River Compact (83 Stat. 86 (1969)), for example, provides that "[t]here shall be no restrictions on the use of the surface wa-

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[7] Respondents claim elsewhere (at 15) that "Texas contain[s] 34% of the watershed." That misleading reference is to Texas's share of the *surface area* of Subbasin 5 and has nothing to do with the amount of water available.

[8] What is more, unless such border crossings were permissible, water originating in a State with more than 25% of the total could not be used by anyone, because (as respondents recognize), the Compact caps each State's use at 25%. That would be inconsistent with the Compact's goal (also recognized by respondents (at 52)) of allocating *all* the water of the Red River and its tributaries. Respondents' answer is that the "water would not be 'unallocated' if some 'excess' water flowed unused to downstream States." *Ibid.* But it is a very strange interpretation that treats water as "allocated" to a State that is directed not to use it.

ters of the Upper Niobrara River by Wyoming." Yet very little of the Upper Niobrara River is located in Wyoming; most of the river is located in Nebraska. The compact thus authorizes Wyoming—without an express cross-border provision—to enter Nebraska to make use of that river's water. The Rio Grande Compact (53 Stat. 785 (1939)) also lacks detailed cross-border provisions. Yet Texas's El Paso County Water Improvement District No. 1 diverts water apportioned by that compact to Texas from a location in New Mexico. See *Far West Texas Water Plan* 3-12, 3-13 (Jan. 2011), http://tinyurl.com/Tarrant30.

And regardless of what *other* compacts may say, other sections of the *Red River Compact* demonstrate that the drafters did not consider express cross-border diversion language necessary. For example, the Compact apportions "the flow from the mainstem of the Red River" along the length of the Texas-Oklahoma border upstream of Lake Texoma in equal shares, "fifty (50) percent to Oklahoma and fifty (50) percent to Texas." 1JA19 (§ 4.04(a), (b)). Yet the main channel of the Red River lies wholly in Oklahoma. For Section 4.04 to make any sense, therefore, Texas must be able to enter Oklahoma to access its 50% share, even without any express authorization for such entry.

5. Respondents describe (at 49-50) the States' course of performance as "the dog that did not bark for thirty years." But even if the Compact could sensibly be analogized to a thirty-year-old dog, respondents' factual description is demonstrably false.

Respondents first assert (at 50) that the States have never "acknowledge[d] in their water plans" a right to access Subbasin 5 water across state lines. In fact, Texas's water plan has, since at least 1992,

identified "interstate diversion of surface water" (from locations including "southeastern Oklahoma") under "existing or future interstate compact agreements" as a preferred source for meeting future water demand. *Water for Texas: Today and Tomorrow* 35 (1992), http://tinyurl.com/Tarrant24.

Respondents also suggest Texas repeatedly has attempted "to *buy* the same water [it] now claim[s] by right." Resp. Br. 2. That is wrong. The water that Texas proposed buying from Oklahoma in the early 2000s would have been debited from *Oklahoma's* share of Subbasin 5 water. 2JA366. And there were compelling business reasons that explained Tarrant's general willingness to purchase Oklahoma's water rather than taking the water allocated to Texas—chief among them that *Oklahoma* would have assumed responsibility for permitting, funding, and constructing all infrastructure, and for acquiring rights-of-way necessary to deliver the water to the Texas state line (2JA372), saving Tarrant and its fellow water suppliers from having to shoulder those massive burdens themselves.[9]

Respondents take equally significant liberties with the record when they say (at 50-51) that "Texas reports confirmed repeatedly that Texas was receiving all waters allocated to it." Respondents cite no "Texas reports" for that claim, instead cross-referenc-

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[9] Respondents' reference (at 7-8) to Texas's tentative assessment of taking water from Arkansas in the 1970s is even further afield. That was not a purchase proposal, and the great majority of subject water was located outside the Red River Basin. The small percentage that was located in the basin was in Reach II, Subbasin 3, allocated to Arkansas. *See An Assessment of Surface Water Supplies of Arkansas* 2-3 (1976), http://tinyurl.com/ArkAssess.

ing a page of their own brief that misdescribes deposition testimony from this litigation. That testimony demonstrates only that Texas water users holding permits for the use of Subbasin 5 water within Texas have not experienced any "shortages" of the water *their permits* authorize them to use. 1JA144-145. That says nothing about whether Texas, as a whole, is receiving its full share of Subbasin 5 water.[10]

F. The relief that Tarrant seeks can and should be granted without further factual development in the district court.

The United States agrees (at 17) that the plain "text of the Compact does not contain a state-boundary restriction on a State's ability to use the excess water in Reach II, Subbasin 5," and (at 23) that "the language of the Compact suggests that state laws concerning the administration of water rights would be preempted to the extent those laws would prevent another State from accessing its allocated share." The government suggests, however, that "such laws would not necessarily be preempted if they were enforced against a compacting State that was capable of accessing its share of water from within its own borders." U.S. Br. 23-24. We disagree with that latter suggestion.

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[10] Respondents also point to the compliance rules (at 17-19, 32, 38, 50), which they say make no mention of cross-border appropriations. Of course, the rules also make no mention of state-line limitations. Regardless, no State has ever called for an accounting to enforce those rules, which "add conditions nowhere apparent on the face of § 5.05(b)(1)." Resp. Br. 38 n.15, 50. It is thus questionable whether the compliance rules are due any consideration.

The Compact's meaning in this regard is settled by its plain language. Nothing in the Compact's promise of "equal rights to the use of" excess water "originating in" and "flowing into subbasin 5" (1JA25) indicates that the States' equal rights must, if possible, first be exhausted within the using State's boundaries. The United States does not suggest otherwise; it points to nothing in the Compact's text that even arguably establishes such a territorial requirement. The factual questions raised by the government concerning the amount of Subbasin 5 water accessible in Texas and the salinity of that water therefore need not be resolved to settle the Compact's meaning.[11]

Rather than looking to the Compact's terms, the government posits (at 24) that, "if a State had access to its 25% share of water from within its borders but endeavored to take all or part of its share from within another State, that could prevent *the other State* from accessing *its* equal share of Reach II, Subbasin 5 water." But if all four States may access their shares of Subbasin 5 water anywhere within the subbasin (as we submit), a State's decision to access water in one location within Subbasin 5 has no bearing on the other States' entitlement or ability to access water elsewhere in the subbasin. Thus, even supposing that Texas could access its full 25% share within its own borders, the Compact *still* would enti-

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[11] Nor is a remand is necessary to address the "other respects" in which, the United States says, "the record with respect to Section 5.05(b)(1) was not fully developed in the proceedings below." U.S. Br. 27. Where compact language is unambiguous, recourse to extrinsic evidence is unnecessary. See *Oklahoma* v. *New Mexico*, 501 U.S. 221, 235 n.5 (1991).

tle Texas water users to access Texas's share of Subbasin 5 water anywhere within Subbasin 5.

Nor would Texas's decision to access a portion of its Subbasin 5 allotment in Oklahoma frustrate Oklahoma's authority "to freely administer water rights and regulate use and control of water within *its* borders." U.S. Br. 24. Tarrant stands on equal footing with any other permit applicant to OWRB, and Tarrant's use of water under any permit that it may ultimately receive would be subject to Oklahoma's power "to regulate within its boundaries the appropriation, use, and control of water," so long as those regulations are "not inconsistent with its obligations under this Compact" (§ 2.10(a)) or "the apportionments made by this Compact" (§ 2.01)).

That said, we agree with the United States that a reversal of the ruling below "would not directly entitle petitioner to a permanent appropriation of 310,000 acre feet per year of surface water from Reach II, Subbasin 5." U.S. Br. 29-30. The sole question before the Court is whether Oklahoma's discriminatory water laws are enforceable against Tarrant. If the Court rules for Tarrant on that question, we agree that specific fact questions bearing on the availability of a permit would remain. *Id.* at 13. But those issues would be resolved, in the first instance, by the OWRB in its review of Tarrant's permit application. They are matters entirely separate from the question whether Oklahoma's water embargo is preempted by the Compact or otherwise invalid under the Commerce Clause. As to *those* issues, no further fact development is necessary.

G. The dormant Commerce Clause provides an alternative basis for reversal.

If the Court decides that the Red River Compact preempts Oklahoma's discriminatory water permitting scheme, it should reverse the Tenth Circuit on that basis alone and need not reach the Commerce Clause question.[12] And if the Court determines that the water at issue here is allocated to Oklahoma, it also need not decide the Commerce Clause issue; Tarrant has never asserted a claim to Oklahoma's apportioned share of Subbasin 5 water.

But if the Court somehow determines that the Compact does not have preemptive effect even though it allocates the subject water to Texas or that some Subbasin 5 water is not allocated to any State, Oklahoma's embargo will preclude the export of that water from the State. In those circumstances, the Court can and should reverse on the basis that Oklahoma's discriminatory permitting scheme violates that dormant Commerce Clause.

In arguing to the contrary, respondents do not deny that Oklahoma's permitting scheme is facially discriminatory. Instead, they assert (at 55) that the dormant Commerce Clause "does not apply" here because "[p]ermits granting the right to appropriate water do not involve economic activity." That is a bewildering claim. In fact, the appropriation and dis-

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[12] Respondents imply (at 21) that we waived the preemption argument below. That is wrong. In the lower courts, Tarrant did not state an affirmative claim to water under the Compact; instead, it sought a declaration that Oklahoma's water embargo is *preempted by* the Compact. That preemption claim is the first and principal count of Tarrant's district court complaint.

tribution of water across state lines is an "archtypical example of commerce among the several States." *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 953 (1982). Oklahoma's refusal to grant an "initial" right to appropriate surface water to anyone who proposes to use the water of out-of-state manifestly *does* "limit the commercial market for water rights" (Resp. Br. 56) by determining, in a facially discriminatory way, who may hold such rights in the first place. The "purpose" of the embargo is undeniably "to confine [water] to the use of the inhabitants of a state," and thereby to ensure the "commercial * * * welfare of the state" at the expense of neighboring States. *West* v. *Kan. Natural Gas Co.*, 221 U.S. 229, 255 (1911). A clearer example of discrimination against interstate commerce would be difficult to conceive.

Respondents also contend (at 54) that, "[i]f the Compact's general language is clear enough to insulate water *apportioned* to Oklahoma from scrutiny, the Compact insulates hypothetically unused 'excess' Subbasin 5 water" as well. (Emphasis added). But that is surely wrong; Compact language that grants Oklahoma use of *up to* 25% of a particular pool of water plainly *precludes* Oklahoma from restricting the use of any more than that 25% share. Thus, on respondents' strained reading, anything over 25% within Oklahoma is necessarily not apportioned to *any* State. Oklahoma's protectionism regarding water allocated to Texas, or not exclusively allocated and therefore open to use by all, accordingly cannot stand.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APRIL 2013

SUPPLEMENTAL BRIEF

No. 11-889

In the Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,

Petitioner,

v.

RUDOLF JOHN HERRMANN *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, petitioner submits this brief to address matters raised by the United States in its brief urging the Court to grant certiorari in this case. We are in complete agreement with the views expressed by the government and here briefly supplement several points made by the United States.

First, and most fundamentally, the government's submission confirms that review is warranted. The United States demonstrates that the Tenth Circuit misinterpreted the Red River Compact, and that this Court's intervention is appropriate to settle a dispute about the meaning of an agreement between States that governs a matter of enormous practical importance. U.S. Br. 11-16. As to this latter point, the real-world impact of the decision below on millions of people cannot be overstated. The United States correctly notes that the Tenth Circuit's holding "has potentially great practical consequences for the availability of water in a major urban area in Texas" (*id.* at 17) and "could have a major impact on petitioner's operations for decades to come." *Id.* at 18. The State of Texas likewise demonstrated that, if not set aside, the ruling below will stifle region-wide economic development, employment, and productivity, while causing significant adverse environmental effects. Texas Br. 5-6. See also Pet. 3-4, 24-25. For the reasons explained by the United States, these considerations warrant review by this Court.

That conclusion is bolstered by a consideration not directly addressed by the United States: The decision below endorsed an approach that could have broad and harmful implications for the interpreta-

tion of interstate water compacts across the Nation. We showed in the petition that many such compacts contain equitable apportionment provisions similar to the one at issue here. Pet. Reply Br. 9-10. And, as the government demonstrates, the Tenth Circuit improperly held that the interpretation of such compacts must be governed by a "presumption against preemption." U.S. Br. 11-12. If not set aside, that rule necessarily will distort the meaning intended by many compacting states. For this reason as well, the decision below is one of considerable and continuing importance that should be reviewed by this Court.

Second, the United States observes that, "[o]nce the question of whether the Compact enables a State to access any portion of its share of Reach II, Subbasin 5 water from outside of its boundaries is resolved, the Commerce Clause has no role to play." U.S. Br. 16. We agree with this observation. The Court could resolve the portion of the dispute currently before it simply by holding that the understanding of the Compact offered by petitioner and supported by the United States is correct—that is, by holding that the Compact allocates an equal share of the water in subbasin 5 to each of the compacting States and (at least in some circumstances) authorizes one of those States to obtain its share from water located in another State. On this reading, "it is the Compact that prohibits respondents from enforcing state laws that would bar such access." *Id.* at 17.[1]

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[1] Respondents are wrong in contending that Oklahoma law "might never be applied to deny petitioner's [permit] request." Resp. Supp. Br. 6; see *id.* at 11-12. The United States correctly notes that the question here is whether "respondents may enforce state laws that effectively prohibit petitioner from diverting any water in Reach II, Subbasin 5." U.S. Br. 10. In fact, the

We note, however, that enforcement of these Oklahoma laws *also* is barred by the Commerce Clause and that, accordingly, the Commerce Clause question presented in the petition is properly in the case. We showed in the petition (at 14-24) that Oklahoma's discriminatory statutes would have the effect of precluding out-of-state users from obtaining *any* water originating in the State; that this discrimination is barred by the Commerce Clause; and that the Tenth Circuit erred in holding that Congress authorized this discrimination when it approved the Compact. The United States has not expressed disagreement with any of these points and, notwithstanding respondents' statement to the contrary, has not "recommended[ed] against granting certiorari on the dormant Commerce Clause question." Resp. Supp. Br. 2; compare U.S. Br. 16-17, 22 ("[t]he petition for a writ of certiorari should be granted"). For this reason, although the Court can resolve the case through application of the Compact alone, it should not limit the grant of certiorari to exclude the Commerce Clause question presented in the petition.[2]

Tenth Circuit below expressly acknowledged the discriminatory nature of Oklahoma's regime (see Pet. App. 5a, 30a), and previously recognized that "a fair reading of the statutes at issue demonstrates that the OWRB is arguably precluded from granting [petitioner's] application. [Petitioner] has thus shown it faces an appreciable threat of injury sufficient to invoke federal jurisdiction." *Tarrant Reg'l Water Dist.* v. *Sevenoaks*, 545 F.3d 906, 910 (10th Cir. 2008).

[2] We understand the United States to reason that petitioner is seeking to obtain only water apportioned to Texas under the Compact and that accepting petitioner's reading of the Compact's allocation provisions therefore is necessary for petitioner to prevail on any theory. We agree with that reasoning, but also note that there are circumstances in which the Commerce Clause nevertheless could continue to play a role in the resolu-

Finally, the United States is correct in noting that, once the meaning of the Compact is settled, additional steps will be necessary to determine the precise amount of water to which Texas is entitled and the terms of any permit obtained by petitioner to divert that water from sources in Oklahoma. See U.S. Br. 20-22. Indeed, petitioner noted that very point below, expressly acknowledging before the lower courts that it seeks in this litigation, not the award of a permit to obtain a specific quantity of water from Oklahoma, but a determination that Oklahoma must allow Texas access to its apportioned share of subbasin 5 water. Those courts responded by holding that the Compact gives Texas no entitlement to the disputed water *at all*. See U.S. Br. 21 (the question whether Texas could access its equal share of Subbasin 5 water from within its boundaries is one "the lower courts refused to consider"). Whether that determination was correct—the question now before this Court—must be settled as a threshold matter before the remaining issues identified by the United States are resolved.

For this reason, the leitmotif of respondents' supplemental brief—its repeated contention that the United States acknowledges "multiple vehicle problems" in the case by noting that final resolution of petitioner's entitlement to a permit will require further proceedings (Resp. Supp. Br. 2; see *id.* at 7, 9, 10-11)—is wrong. The initial question of law that

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tion of the case. For one, the Compact might be read (incorrectly, in our view) to allocate an equal share of reach II, subbasin 5 water to Texas but not to grant Texas an entitlement to enter Oklahoma to obtain that water. Cf. Pet. App. 40a-41a. If the Compact were (mis)read to allocate subbasin 5 water to Texas but not to affirmatively authorize entry into Oklahoma to get it, the Commerce Clause would come into play.

must be settled here is whether the Compact entitles Texas to its apportioned "equal" share of subbasin 5 water.[3] If this Court grants review and holds that it does, the further and different questions noted by the United States about the particulars of petitioner's permits could be answered, in the first instance, by the Oklahoma and Texas permitting authorities that will act on petitioner's permit applications. When that is done, we are fully confident that reversal of the decision below by this Court will in fact ultimately result in petitioner obtaining the water currently in dispute. See No. 10-6184, *Tarrant Regional Water Dist.* v. *Herrmann* (10th Cir.), oral arg. Tr. 32, 46 (offer of proof).

CONCLUSION

The petition for a writ of certiorari should be granted.

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[3] Respondents are simply incorrect in asserting that "the Texas Red River Compact Commission confirmed that Texas received all its water under the Compact from 2005-09." Resp. Supp. Br. 9. Respondents are misdescribing the deposition testimony of a single Compact Commissioner, who said only that certain Texas permittees had received all the water to which they were entitled under Texas permits that have no bearing on this case. See Pl. CA10 Br. 5-6 & n.11. Respondents use similar sleight-of-hand in contending that "blame rests squarely on petitioner" for the absence of record evidence on "'Texas' current use or receipt of water under the Compact.'" Resp. Supp. Br. 10. The question here is not how much Compact water Texas *currently* uses; it is whether Texas is entitled to the *additional* water petitioner seeks for future use. The Tenth Circuit expressly refused to consider factual questions that might bear on that issue "because [it] h[e]ld that [Compact] § 5.05(b)(1) does not allocate water located in Oklahoma to Texas *regardless of what amount of water Tarrant and other Texas users can appropriate in Texas*." Pet. App. 44a n.3 (emphasis added). See U.S. Br. 13. That legal holding is challenged here.

Respectfully submitted.

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DECEMBER 2012

SUPPLEMENTAL BRIEF

No. 11-889

IN THE

Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
Petitioner,

v.

RUDOLF JOHN HERRMANN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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SUPPLEMENTAL BRIEF

Petitioner, Tarrant Regional Water District, seeks to enjoin the Oklahoma Water Resources Board ("OWRB") from applying any Oklahoma law that might limit out-of-state water use. Petitioner applied for a permit to divert water into Texas from Oklahoma's Kiamichi River, located in Reach II, Subbasin 5 of the Red River Compact ("Compact")—a region of Oklahoma that currently is suffering extreme drought. The water in Reach II, Subbasin 5 crosses Oklahoma, Texas, and Arkansas. Under Section 5.05(b)(1) of the Compact, Oklahoma, Texas, Arkansas, and Louisiana "shall have equal rights to the use of" certain surface water in Reach II, Subbasin 5, "so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second." Compact § 5.05(b)(1).

Before the OWRB could consider petitioner's application, petitioner challenged numerous Oklahoma laws as preempted by Section 5.05(b)(1) and as violating the dormant Commerce Clause. Both lower courts unanimously and correctly rejected those arguments.

The United States' equivocal brief just underscores why this case does not merit further review. The government identifies no circuit split on either question presented, no implicated federal interest, and no possibility that the decision could affect anyone beyond the parties here. U.S. Br. 17, 20-21. And the government correctly concludes that the petition's primary question under the dormant Commerce Clause is not worthy of review. *Id.* 16-17.

The government nonetheless recommends that the Court decide whether a unanimous Tenth Circuit panel correctly held that Section 5.05(b)(1) does not preempt Oklahoma's water laws. In the government's view, Section 5.05(b)(1) could be read to grant Texas the right to enter into Oklahoma and take water across state lines. The government is candid that this extraordinary intrusion on state sovereignty depends on "extrinsic evidence" outside the record, *id.* 13, and on "additional issues that would have to be resolved[] in this case or other proceedings," *id.* 10. And, even if Section 5.05(b)(1) allowed Texas to take water from Oklahoma under certain circumstances, the Compact still "would not directly entitle petitioner to [the] permanent appropriation [of water from Oklahoma]" that it seeks. *Id.* 20. The government's recommendation of a limited grant is difficult to reconcile with its description of the multiple vehicle problems this case poses.

The Court should decline review on both questions presented rather than proceeding on an incomplete record to resolve issues of state and federal law that might not even impact petitioner's water needs.

I. The Dormant Commerce Clause Question Does Not Warrant Review

The United States correctly recommends against granting certiorari on the dormant Commerce Clause question. *Id.* 16-17.

A. Although the government takes no position on the merits, the Tenth Circuit's decision is correct. The court carefully distinguished petitioner's principal authority, *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), which held that congressional statements deferring to state law in other, unrelated

water compacts did not insulate state laws regulating un-compacted groundwater from dormant Commerce Clause attack. *Id.* 958-60. As the Tenth Circuit explained, this case is distinguishable because the water at issue in *Sporhase* was not regulated pursuant to an interstate compact, Pet. App. 23a, while here "the water is subject to the Red River Compact, and the issue is whether the Compact insulates Oklahoma's statutes from dormant Commerce Clause challenge," *id.*

The *Sporhase* dissent correctly observed that each state has the "traditional authority . . . over resources within its boundaries which are essential not only to the well-being but often to the very lives of its citizens." 458 U.S. at 963 (Rehnquist, J., dissenting). Moreover, "'[c]ommerce' cannot exist in a natural resource that cannot be sold, rented, traded, or transferred, but only *used*." *Id.* The applicability of the dormant Commerce Clause is even more attenuated to natural resources allocated under an interstate compact. States, after all, enter into such compacts to preserve their access to water and to exclude others. In all events, assuming that States need clear congressional authorization to regulate in-state use of natural resources, the Tenth Circuit found the requisite authorization in the "broad language of [twelve] key Compact provisions." Pet. App. 24a.

B. The Tenth Circuit's holding does not implicate any other compact—and the United States does not suggest otherwise. The court held that twelve Compact provisions collectively demonstrated Congress's clear consent to state laws that protect in-state use of water allocated under the Compact. Pet. App. 27a-28a. The court pointed to Section 2.01,

which permits Oklahoma to "use the water allocated to it by this Compact *in any manner* deemed beneficial" and to "*freely administer* water rights and uses in accordance with [its] laws." *Id.* 24a-25a (emphases added). The court relied on multiple provisions guaranteeing States "free and unrestricted use of the water" allocated under the Compact. *Id.* 26a (citing §§ 4.02(b), 4.03(b), 5.01(b), 5.02(b), 5.04(b), 6.04(b), 7.01(b), and 8.01). And the court discussed Section 2.10(a), which provides, "[n]othing in this Compact shall be deemed to . . . [i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water." *Id.* 25a-26a.

Almost no other interstate water compact contains such broad statements permitting unrestricted state administration of water rights. Only *one* of the sixteen compacts cited by petitioner, Pet. 25 n.12, contains similar language to Section 2.01: the 1954 Sabine River Compact between Texas and Louisiana. 68 Stat. 690 (1954), art. V(k). Petitioner never mentions *nine* other compacts governing water in the West that contain no such language.[1] Language similar to the Compact's guarantee of "free and unrestricted use" appears in only *four* of the compacts petitioner cites. Sabine River Compact, art. IV; Arkansas River Basin Compact, Kansas-Oklahoma, 80 Stat. 1409 (1966), arts. V, VI; Kansas-Nebraska Big

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[1] Amended Bear River Compact, 72 Stat. 38 (1958); Belle Fourche River Compact, 58 Stat. 94 (1944); Amended Costilla Creek Compact, 77 Stat. 350 (1963); Klamath River Basin Compact, 71 Stat. 497 (1957); La Plata River Compact, 43 Stat. 796 (1925); Rio Grande Compact, 53 Stat. 785 (1939); South Platte River Compact, 44 Stat. 195 (1926); Upper Niobrara River Compact, 83 Stat. 86 (1969); Yellowstone River Compact, 65 Stat. 663 (1951).

Blue River Compact, 86 Stat. 193 (1972), §§ 5.2, 5.3; Canadian River Compact, 66 Stat. 74 (1952), arts. IV(a), IV(b), V, VI.

The petition thus incorrectly frames this case as nationally important on the theory that almost all Western water compacts "contain[] the same boilerplate language that the Tenth Circuit found to insulate the Red River Compact from Commerce Clause scrutiny." Pet. 25. Although petitioner focuses on Section 2.10, *id.*, the Tenth Circuit gave no greater weight to this provision than the eleven others it analyzed. Nor is Section 2.10 "boilerplate." Not every compact cited in the petition includes Section 2.10's non-interference language. *See* Republican River Compact, 57 Stat. 86 (1943). And *none* of the nine Western water compacts petitioner failed to cite contains such language.

C. This case also is a bad vehicle to resolve the Commerce Clause question. The Commerce Clause analysis turns, at least in part, on the meaning of Section 5.05(b)(1), which the Tenth Circuit relied upon to find a clear statement of congressional intent to preserve state water use laws under the Commerce Clause. As discussed below, there are multiple vehicle problems in resolving Section 5.05's meaning. Those vehicle problems extend *a fortiori* to the Court's Commerce Clause analysis.

Furthermore, the fact that this case does not arise under the Court's original jurisdiction counsels against review, not in favor. *See* U.S. Br. 17-18. The Court ordinarily is the first and only forum to review disputes between States over interstate compacts because of the Court's original and exclusive jurisdiction over such matters. The Compact, however, gave district courts concurrent jurisdiction, Compact

§ 13.03, and two federal courts accordingly have reviewed and rejected petitioner's arguments. We are aware of no case in the past fifty years in which this Court has exercised its *certiorari* jurisdiction to review a lower court's interpretation of a water compact. *See, e.g., Intake Water Co. v. Yellowstone River Compact Comm'n*, 476 U.S. 1163 (1986) (denying certiorari). The need to review such disputes dissipates when lower courts "provide[d] an appropriate forum in which the issues tendered here may be litigated." *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) (per curiam).

Nor do the "potential[]" "practical consequences" for the Tarrant Regional Water district, U.S. Br. 17, justify review. The Tenth Circuit's decision hardly consigns Fort Worth to drought or prevents petitioner from pursuing the many alternative water sources it seeks. Opp. 35-37. The decision just requires petitioner to continue working to overcome political challenges that have so far prevented petitioner from securing water sources within Texas.

Finally, a decision from this Court might be irrelevant, because petitioner has prematurely challenged laws that might never be applied to deny petitioner's request. The OWRB can deny permits on several independent grounds. *See* Okla. Stat. tit. 82 § 105.14; Okla. Admin. Code 785:20-5-7. For instance, the OWRB could deny petitioner's permit for failing to establish a "present or future need for the water" in light of "all stream water sources" and groundwater potentially available to petitioner. Okla. Stat. tit. 82 § 105.12(A)(2). Or the OWRB could deny the permit if it interferes with projected current and future needs of users within the "stream system wherein the water originates." *Id.* § 105.12(A)(4). On

that point, the United States is conspicuously silent about the historic drought Oklahoma is suffering, in which 90 percent of the state—including the Kiamichi River region—is under "extreme drought conditions." U.S. Drought Monitor (Dec. 4, 2012), http://droughtmonitor.unl.edu/DM_state.htm?OK,S. That reality undermines the government's sole basis for supporting certiorari—a policy basis—that Fort Worth is a large city looking for new water sources outside Texas.

II. The Preemption Question Does Not Warrant Review

In the government's view, the Tenth Circuit may have misread Section 5.05(b)(1)'s preemptive effect. U.S. Br. 10. The government asserts that *if* "certain circumstances" apply, Section 5.05(b)(1) might entitle Texas to divert up to 25 percent of all "excess" water from any Reach II, Subbasin 5 sources in Oklahoma or Arkansas. *Id.* 12. *If* additional circumstances apply, petitioner *might* also have a right to the particular water it seeks. *Id.* 21. And *if* the Oklahoma laws would prevent petitioner from exercising Texas's right of access, only then would those laws be preempted. *Id.* 16. This Court cannot give a definitive interpretation of a Compact provision that depends on unsettled questions of law and fact.

A. The Tenth Circuit's decision is manifestly correct. Section 5.05(b)(1) guarantees each state "equal rights to the use of" Reach II, Subbasin 5 water within its borders. Pet. App. 36a-40a. Nothing in Section 5.05(b)(1)'s text suggests "equal rights" includes the unprecedented right to cross state borders and seize water in another State. We are aware of no instance in which any State has *ever* invoked an interstate compact to divert water from

another State's territory absent express authorization. *Cf. Sporhase*, 458 U.S. at 963 (Rehnquist, J., dissenting).

The Tenth Circuit properly concluded that Section 5.05(b)(1) does not implicitly authorize such an extraordinary intrusion. Analyzing all the provisions in Section 5.05—rather than just the singular phrase "equal rights" that petitioner relies upon, Pet. 27—the Tenth Circuit correctly interpreted Section 5.05(b)(1) to reflect the "principle that the upstream states [Oklahoma, Texas, and Arkansas] control the water within their boundaries, provided they meet their minimum flow obligations to downstream states and do not take more than an equal share of the excess water." Pet. App. 39a. The Tenth Circuit held that "[t]o suggest that § 5.05(b)(1) gives appropriators such as [petitioner] license to come into Oklahoma and appropriate water for use in Texas in contravention of Oklahoma law runs counter to the purpose of the Compact, the purpose of § 5.05(b)(1), and the presumption against preemption when there is no clear conflict between state and federal law and the state law applies to a matter of historic state concern." *Id.* 43a.

That holding raises no broader issues of preemption. The United States argues that the Tenth Circuit "improperly applied a presumption against preemption to determine whether the challenged Oklahoma statutes conflict with" Section 5.05(b)(1). U.S. Br. 11. The government identifies no circuit conflict on this issue—probably because no court has ever adopted the government's position that a generalized "presumption against preemption" is inapplicable to interstate compacts, which are, after all, federal laws. *Id.* 12. Nor did the Tenth Circuit's

holding turn on a generalized presumption. The court applied a fact-based presumption based on the Compact provisions "call[ing] for pronounced deference to, not displacement of, state water laws." Pet. App. 40a. The court held that petitioner's reading of Section 5.05(b)(1) was unreasonable "when § 5.05(b)(1) is read in conjunction with the Compact as a whole." *Id.* The court only then noted, in the alternative, that "even if [petitioner's inferences] were reasonable," they "run afoul of the presumption against preemption." *Id.*

Section 5.05(b)(1)'s meaning affects no other compact and has never before been in doubt. Beyond this case, no court has construed this provision. The district court and Tenth Circuit agreed Section 5.05(b)(1) limits the maximum amount of water Oklahoma, Texas, and Arkansas can draw upstream, and rejected petitioner's contrary reading. *Id.* 28a-29a, 40a-43a, 70a. No Tenth Circuit judge thought *en banc* review was warranted. *Id.* 85a. And no other interstate compact has a provision like Section 5.05(b)(1).

Nor has Section 5.05(b)(1)'s meaning ever seemed unclear to the States. No State in the Compact's 32-year history has claimed a right to divert water from another State's territory under this Compact. No State has suggested that its "equal rights" under Section 5.05(b)(1) were impaired. In fact, the Texas Red River Compact Commission confirmed that Texas received all its water under the Compact from 2005-09. C.A. Defs. App. 29-34, 56-63. If the interpretation of Section 5.05(b)(1) "implicates important state interests protected by an interstate compact," U.S. Br. 17, the States involved have been indifferent to asserting them.

B. This case, in all events, is a poor vehicle to decide Section 5.05(b)(1)'s meaning. The government's interpretation admittedly turns on a "factual context for the Compact [that] may not be fully developed in some respects." *Id.* 10. That concession should be fatal to certiorari.

The government argues that Section 5.05(b)(1) might let Texas take out-of-state water only if Texas could not access its full "share" in-state, and faults the Tenth Circuit for "refus[ing] to consider" this "factual question." *Id.* 21. But blame rests squarely on petitioner. When the Tenth Circuit ordered supplemental briefing on whether petitioner "made a showing that the State of Texas is receiving less than its share of water under §5.05," petitioner replied that it "has neither alleged nor presented evidence regarding Texas' current use or receipt of water under the Compact, since that is not an element of [its] claim for relief." C.A. Tarrant Suppl. Br. 1.

The government further proposes that Section 5.05(b)(1) might allow petitioner to take water from Oklahoma only if Texas's interests outweighed "the competing interests of water users in Oklahoma and other compacting States" and "environmental and other restrictions." U.S. Br. 21. The United States then wonders whether Section 5.05(b)(1) might allow petitioner to choose where in Oklahoma to take Texas's "share," if Texas-side tributaries of the Red River were too intermittent or the main stem too salty. *Id.* 13 n.7. These conjectures turn on extrinsic facts and would convert Section 5.05(b)(1) into a free-for-all, multi-factor test at war with the easily administrable framework the States intended. *See* Opp. 2.

Moreover, even were the United States and petitioner correct that Section 5.05(b)(1) entitles Texas to access Oklahoma water under some circumstances, Section 5.05(b)(1) still might not preempt the Oklahoma laws petitioner challenges. Petitioner has made an implied preemption argument, asserting that Oklahoma's laws conflict with, or would frustrate the purposes of, Section 5.05(b)(1) because the Oklahoma laws purportedly impose "an absolute embargo on the export of water from the State for out-of-state use." Pet. 7, 27-28; U.S. Br. 10.

The problem with this position is that the laws petitioner challenges might not be applied to petitioner's permit application at all—and would thus not impede petitioner's ability to access water in Oklahoma. Preemption requires that state laws actually conflict with, or impede, federal laws; if the state laws are inapplicable, *a fortiori* there is no preemption. And the applicability of Oklahoma's laws is an open question. Petitioner does not even identify all state laws it challenges, instead giving examples of the "Oklahoma scheme" it thinks might be applied to its application. Pet. Reply 1; Pet. 7-9. Many of petitioner's examples are inapplicable on their face. For instance, petitioner challenges laws that limit contracts for the sale of water for out-of-state use, *see* Okla. Stat. tit. 82 §§ 1085.2(2), 1324.10(B), but does not seek such a contract.

Other Oklahoma laws, too, may be inapplicable. Many Oklahoma laws limiting out-of-state water use were enacted in 2009 when Oklahoma "substantially overhauled the water permit application process," Pet. App. 9a, and have yet to be construed. For instance, this Court would have to determine how

the OWRB would "evaluate" whether the water petitioner seeks "could feasibly be transported to alleviate water shortages" in Oklahoma. Okla. Stat. tit. 82 § 105.12(A)(5). Where, as here, "[t]here is a basic uncertainty about what the law means and how it will be enforced . . . it would be inappropriate to assume" the challenged state laws "will be construed in a way that creates a conflict with federal law." *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012). This Court accordingly should decline to consider an issue of implied preemption on a host of unresolved contingencies that are necessary to fully decide this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

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AMICUS CURIAE BRIEF

No. 11-889

In the Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT, PETITIONER

v.

RUDOLF JOHN HERRMANN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING VACATUR AND REMAND

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QUESTIONS PRESENTED

The Red River Compact (the Compact) apportions the water in the Red River Basin among the States of Arkansas, Louisiana, Oklahoma, and Texas. Act of Dec. 22, 1980, Pub. L. No. 96-564, 94 Stat. 3305. To accomplish that apportionment, the Compact divides the Red River Basin into five reaches, and it further divides each reach into subbasins. Compact § 2.12, 94 Stat. 3307; Art. IV-VIII, 94 Stat. 3308-3315. For the water in Reach II, Subbasin 5, the Compact provides:

> The Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second.

§ 5.05(b)(1), 94 Stat. 3311. The questions presented are as follows:

1. Whether Section 5.05(b)(1) of the Compact allows petitioner to divert water included in Texas's apportionment for Reach II, Subbasin 5 from within Oklahoma, thereby superseding Oklahoma statutes that would prohibit Texas water users from accessing that water.

2. Whether the Commerce Clause prohibits respondents from enforcing Oklahoma statutes that would prevent petitioner from accessing Texas's apportionment of Reach II, Subbasin 5 water from within Oklahoma.

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In the Supreme Court of the United States

No. 11-889

TARRANT REGIONAL WATER DISTRICT, PETITIONER

v.

RUDOLF JOHN HERRMANN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING VACATUR AND REMAND

INTEREST OF THE UNITED STATES

This case presents the questions (1) whether the Red River Compact allows petitioner to divert water included in Texas's apportionment for Reach II, Subbasin 5 from within Oklahoma, and (2) whether the Commerce Clause prohibits respondents from enforcing Oklahoma statutes that would prevent petitioner from doing so. The Red River Compact was negotiated with the permission of Congress and was subsequently approved by Congress. See Act of Aug. 11, 1955, ch. 784, 69 Stat. 654; Act of Dec. 22, 1980, Pub. L. No. 96-564, 94 Stat. 3305. The United States has a substantial interest in the proper interpretation of interstate compacts apportioning water. At the Court's invitation, the United States filed a brief amicus curiae at the petition stage of this case.

STATEMENT

1. The Red River flows from west to east across the north Texas panhandle, forms the boundary between Oklahoma and Texas and then between Arkansas and Texas, then flows through Arkansas and finally into Louisiana, where it joins the Atchafalaya and Mississippi Rivers. See Pet. App. 52a. In 1955, Congress granted permission to Arkansas, Louisiana, Oklahoma, and Texas to negotiate an agreement apportioning the water in the Red River Basin among those States. Act of Aug. 11, 1955, ch. 784, 69 Stat. 654. In 1978, the States entered into the Red River Compact, which Congress approved in 1980 Act of Dec. 22, 1980 (Compact), Pub. L. No. 96-564, 94 Stat. 3305. One purpose of the Compact is to "provide an equitable apportionment among the Signatory States of the water of the Red River and its tributaries." § 1.01(b), 94 Stat. 3305. To accomplish that apportionment, the Compact divides the Red River Basin into five reaches, and it further divides each reach into subbasins. § 2.12, 94 Stat. 3307; Art. IV-VIII, 94 Stat. 3308-3315; see Pet. Br. App. (map depicting the five reaches and the five subbasins in Reach II). The water in each subbasin is allocated to one or more of the compacting States. Art. IV-VIII, 94 Stat. 3308-3315.

Section 2.01 of the Compact provides that "[e]ach Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state." 94 Stat. 3306. That section further provides that "[e]ach state may freely administer water rights and uses in accordance with the laws of that state, but such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact." *Ibid.* Section 2.10(a) provides that "[n]othing in this Compact shall be deemed to * * * [i]nterfere with or

impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, not inconsistent with its obligations under this Compact." 94 Stat. 3306-3307.

2. a. Petitioner is a Texas state agency that provides water to north-central Texas, including Fort Worth, Arlington, and Mansfield. Pet. App. 4a. In 2007, in an effort to procure water for the growing needs of its service area, petitioner applied to the Oklahoma Water Resources Board (OWRB) for permits to appropriate water at three locations in Oklahoma.[1] At issue in this case is petitioner's application for a permit to appropriate 310,000 acre feet per year of surface water from the Kiamichi River, a tributary of the Red River that is located in Oklahoma. 2 J.A. 8-26 (permit application). Petitioner sought permission to divert water from the Kiamichi River above where it discharges into the main stem of the Red River. According to petitioner, the water becomes "irreversibly degraded in quality beyond potable beneficial purposes" by salinity in the main stem. C.A. App. 58 (petitioner's motion for a temporary restraining order); 2 J.A. 2 (affidavit of Dan Buhman); Pet. Br. 6. The Kiamichi River originates in Reach II, Subbasin 1 and then flows south into Reach II, Subbasin 5. The water in Reach II, Subbasin 1 is apportioned to Oklahoma, which "shall have unrestricted use thereof." § 5.01(b), 94 Stat. 3310. The proposed point of petitioner's diver-

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[1] Oklahoma law provides that anyone "intending to acquire the right to the beneficial use of any water" located in Oklahoma, including any "state or federal governmental agency, or subdivision thereof," must apply to OWRB for a permit. Okla. Stat. Ann. tit. 82, § 105.9 (West 1990).

sion is downstream on the Kiamichi, in Reach II, Subbasin 5. See Pet. Br. App.

The Compact defines Reach II, Subbasin 5 as "th[e] portion of the Red River, together with its tributaries, from Denison Dam down to the Arkansas-Louisiana state boundary, excluding all tributaries included in the other four subbasins of Reach II." § 5.05(a), 94 Stat. 3311. That geographic area includes portions of Arkansas, Oklahoma, and Texas. Pet. App. 36a, 52a. The "tributaries included in the other four subbasins," and thereby excluded from Subbasin 5, are generally the portions of tributaries flowing into that stretch of the main stem that are "above existing, authorized and proposed last downstream major damsites" on those tributaries. See §§ 5.01(a), 5.02(a), 5.03(a), 5.04(a), 94 Stat. 3310-3311.[2] Thus, Subbasin 5 is the portion of the Red River watershed below those damsites on both sides of the main stem of the river between Denison Dam and the Arkansas-Louisiana boundary.

As relevant here, the water in Reach II, Subbasin 5 is apportioned as follows:

> The Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second.

Compact § 5.05(b)(1), 94 Stat. 3311.[3] When the Red River's flow is below 3000 cubic feet per second at the Ar-

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[2] The specific damsites are identified in each section.

[3] The Compact defines the term "undesignated water" as "all water released from storage other than 'designated water.'" § 3.01(l), 94

kansas-Louisiana boundary, Arkansas, Oklahoma, and Texas must "allow to flow into the Red River for delivery to * * * Louisiana a quantity of water equal to 40 percent of the total weekly runoff originating in subbasin 5 and 40 percent of undesignated water flowing into subbasin 5." § 5.05(b)(2), 94 Stat. 3311. When the flow at the Arkansas-Louisiana boundary falls below 1000 cubic feet per second, Arkansas, Oklahoma, and Texas must "allow a quantity of water equal to all the weekly runoff originating in subbasin 5 and all undesignated water flowing in subbasin 5 within their respective states to flow into the Red River." § 5.05(b)(3), 94 Stat. 3311-3312. When the flow at Index, Arkansas is below 526 cubic feet per second, Oklahoma and Texas must "allow a quantity of water equal to 40 percent of the total weekly runoff originating in subbasin 5 within their respective states to flow into the Red River." § 5.05(c), 94 Stat. 3312.[4]

b. On the same day that petitioner filed its permit applications, petitioner brought this suit against the members of the OWRB, respondents here, in federal district court in Oklahoma.[5] Petitioner sought declara-

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Stat. 3308. It defines "designated water" as "water released from storage, paid for by non-Federal interests, for delivery to a specific point of use or diversion." § 3.01(k), 94 Stat. 3308.

[4] Petitioner's other two permit applications sought permission to appropriate water from Beaver Creek and Cache Creek, which are Oklahoma tributaries of the Red River in Reach 1, Subbasin 2. Pet. 10. Under the Compact, Oklahoma has "free and unrestricted use" of the water in that subbasin. § 4.02(b), 94 Stat. 3309. Petitioner does not seek review of the court of appeals' affirmance of summary judgment for respondents on those claims. Pet. Br. 5 n.1.

[5] Section 13.03 of the Compact provides that "[t]he United States District Courts shall have original jurisdiction (concurrent with that of the Supreme Court of the United States, and concurrent with that

tory and injunctive relief barring respondents from applying certain Oklahoma statutes that govern the sale, exportation, and use of water to bar petitioner from diverting water in Oklahoma. Pet. App. 2a. Specifically, petitioner challenged now-expired statutes that were enacted in 2004 and placed a five-year moratorium on the export of water from Oklahoma. See Pet. App. 6a-7a; Okla. Stat. Ann. tit. 82, § 1B(A) and tit. 74, § 1221.A (West Supp. 2012); Pet. App. 7a. Petitioner also challenged, *inter alia*, another statute that provides an exception to the general requirement that permitted water be put to beneficial use within seven years only if the proposed use "will promote the optimal beneficial use of water in [Oklahoma]," *id.* § 105.16(B) (West Supp. 1993). Petitioner alleged that the Oklahoma statutes place impermissible burdens on interstate commerce in violation of the Commerce Clause and are preempted by the grant of "equal rights" to the use of Reach II, Subbasin 5 water to all four compacting States under Section 5.05(b)(1) of the Compact. Pet. App. 6a. By stipulation of the parties, respondents will take no action on petitioner's permit applications until this litigation concludes. Pet. Br. 16.

Respondents moved to dismiss the complaint on grounds of ripeness, Eleventh Amendment immunity, abstention principles, and failure to join Louisiana and Arkansas as parties. Pet. App. 8a. The district court denied the motion. *Tarrant Reg'l Water Dist.* v. *Herrmann*, No. CIV-07-0045-HE, 2007 WL 3226812

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of any other Federal or state court, in matters in which the Supreme Court, or other court has original jurisdiction) of any case or controversy involving the application or construction of this Compact." 94 Stat. 3319. That jurisdiction "shall include, but not be limited to, suits between Signatory States." *Ibid.*

(W.D. Okla. Oct. 29, 2007). In doing so, the court stated its understanding that it did not need to "appropriate water or * * * determine water rights under the Red River Compact," because petitioner had "merely challenged the validity of the Oklahoma laws in question." *Id.* at *5. The court of appeals affirmed. *Tarrant Reg'l Water Dist.* v. *Sevenoaks*, 545 F.3d 906 (10th Cir. 2008).

c. Petitioner then amended its complaint to challenge additional Oklahoma laws that were enacted after the complaint was filed. Petitioner challenged a new requirement that the OWRB must consider whether water that is the subject of a permit application for out-of-state use "could feasibly be transported to alleviate water shortages in the State of Oklahoma" (Okla. Stat. Ann. tit. 82, § 105.12(A)(5) (West Supp. 2012)); a requirement that the OWRB may not issue permits to out-of-state water users if that use would "[i]mpair the ability of the State of Oklahoma to meet its obligations under any interstate stream compact" (*id.* § 105.12A(B)); a periodic permit-review scheme applicable only to out-of-state water users (*id.* § 105.12(F)); and a requirement of legislative approval before the OWRB may grant a permit to for out-of-state water users for "water apportioned to [Oklahoma] under an interstate compact" (*id.* § 105.12A(D)). Pet. App. 9a-10a.

3. The district court granted summary judgment for respondents. Pet. App. 53a-74a.

a. The court rejected petitioner's argument that the Oklahoma statutes, by placing restrictions on out-of-state applicants for Oklahoma water permits, violate the Commerce Clause. Pet. App. 61a-69a. The court concluded that although the Commerce Clause is "ordinarily directed to preventing protectionist state measures designed to secure an economic or other advantage for

the state or its citizens," "approval of the [Compact] by Congress * * * constituted its consent to a legal scheme different from that which would otherwise survive Commerce Clause scrutiny." *Id.* at 67a, 68a.

b. In a one-paragraph discussion, the district court also rejected petitioner's argument that the Oklahoma statutes are preempted by the Compact. Pet. App. 70a. The court found "no necessary conflict between the federal law here in question—the [Compact]—and the state laws [petitioner] challenges" because "[t]he compact itself explicitly states it is not intended to supplant any state legislation if it is otherwise consistent with the compact." *Ibid.* In so ruling, the court did not refer to Section 5.05 of the Compact. The court further stated that "[i]n light of the foregoing discussion as to Congress' intent in the context of a Commerce Clause claim, the court can discern no basis upon which the [Compact] could be a basis for preemption, at least in the context of any claim which [petitioner] has standing to pursue." *Ibid.*

The district court observed that "[a]n effort by the State of Texas (or another signatory state) to acquire water allocated to it by the compact, if thwarted by one or more of the challenged statutes, might well give rise to a claim under the compact in favor of that state." Pet. App. 68a n.16. But the court stated that although petitioner is a subdivision of the State of Texas, it was not entitled to assert in these proceedings rights that Texas has under the Compact. *Ibid.* The court also expressed an understanding elsewhere in its opinion that petitioner's claims, "though involving issues of compact interpretation, are not based directly on the assertion of rights under the [Compact]." *Id.* at 60a.

c. After petitioner amended its complaint to make clear that it was authorized by Texas to acquire water apportioned to Texas under the Compact, the district court issued a further order stating that "the court's prior determination of the various constitutional questions was not grounded wholly, or even principally, on a question of standing." Pet. App. 82a-83a.

4. The court of appeals affirmed. Pet. App. 1a-52a.

a. The court first rejected petitioner's Commerce Clause argument. Pet. App. 15a-28a. The court acknowledged this Court's holding in *Sporhase* v. *Nebraska*, 458 U.S. 941 (1982), that a Nebraska law restricting the interstate transfer of groundwater violated the Commerce Clause. Pet. App. 19a. The court also acknowledged that a protectionist state law restricting commerce in water can withstand Commerce Clause scrutiny only if Congress's consent to the state law is "expressly stated" or otherwise "unmistakably clear." *Id.* at 19a-20a (citing *Sporhase*, *supra*, and *South-Central Timber Dev.* v. *Wunnicke*, 467 U.S. 82 (1984)). But here, the court concluded, the Compact contains such a clear statement. *Id.* at 24a.

The court of appeals explained that by ratifying Section 2.01's statement that "Oklahoma may 'freely administer' appropriated water and use it 'in any manner' the state deems beneficial, Congress conferred broad regulatory authority on the state using unqualified terms." Pet. App. 24a-25a; see also *id.* at 25a-26a (citing Compact § 2.10(a), 94 Stat. 3306-3307). The court determined that, "[t]aken together, the Compact provisions * * * give the Oklahoma Legislature wide latitude to regulate interstate commerce in its state's apportioned water." *Id.* at 27a.

b. The court of appeals also rejected petitioner's argument that Section 5.05(b)(1) of the Compact preempts Oklahoma statutes that prevent Texas water users from diverting Reach II, Subbasin 5 water in Oklahoma. Pet. App. 28a-45a. The court was "especially reluctant to find preemption in matters of longstanding state regulation," and it believed that "[t]he presumption against preemption is particularly strong in this case because history reveals 'the consistent thread of purposeful and continued deference to state water law by Congress.'" *Id.* at 34a-35a (quoting *California* v. *United States*, 438 U.S. 645, 653 (1978)).

The court found it significant that the Compact's general provisions "demonstrate pronounced federal deference to state water law." See Pet. App. 35a (citing Compact §§ 2.01 and 2.10(a), 94 Stat. 3306-3307). The court also pointed to Section 5.05(b)(3) and (c), which it read as merely providing protection to Louisiana and Arkansas during periods of low flow, and which require upstream states to allow certain quantities of water "within their respective states" to flow into the Red River to maintain downstream flow requirements. *Id.* at 37a, 39a. The court concluded that, "[t]aken together, the provisions of [Section] 5.05 stand for the principle that the upstream states control the water within their boundaries, provided they meet their minimum flow obligations to downstream states and do not take more than an equal share of the excess water." *Id.* at 39a. The court found support for this limited view of Section 5.05's purposes in the interpretive comments provided by the compact drafters' Legal Advisory Committee, 1 J.A. 7-51. See Pet. App. 39a.[6]

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[6] The Legal Advisory Committee wrote interpretive comments "so that members of the respective legislatures, congressional commit-

The court also noted that Section 5.05(b)(1) itself "does not say that a Texas user is entitled to take Texas's share of th[e] water from a tributary located in Oklahoma[,] [a]nd it does not say that the OWRB is precluded from applying Oklahoma water laws to a[n] * * * application to divert water in Oklahoma for use in Texas." Pet. App. 40a. The court explained that although those conclusions might nonetheless be plausibly inferred "based on the language of [Section] 5.05(b)(1) alone," they are not reasonable when Section 5.05(b)(1) is read in conjunction with the Compact as a whole, especially in light of the presumption against preemption. *Ibid.*

For those reasons, the court concluded that the language in Section 5.05(b)(1) affording each State "equal rights to the use of" the excess water in Reach II, Subbasin 5 "can reasonably be read to mean that each signatory state has the same opportunity and entitlement to use up to 25 percent of the excess water *in its state* and under its state laws," but not to divert any water outside its own borders. Pet. App. 42a-43a (emphasis added).

SUMMARY OF ARGUMENT

I. An interstate compact is "a contract * * * that must be construed and applied in accordance with its terms." *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987) (citation omitted). Based on the text of the Red River Compact and the record developed in this case, the better interpretation is that Oklahoma may not categorically foreclose Texas from diverting water in Reach II,

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tees, Federal agencies, and subsequent compact administrators might be apprised of the intent of the Compact Negotiating Committee with regard to each Article of the Compact." 1 J.A. 9.

Subbasin 5 of the Red River in Oklahoma, at least where such a prohibition would prevent Texas from exercising its "equal right[]" under Section 5.05(b)(1) of the Compact to use excess water in that subbasin.

A. The court of appeals improperly applied a presumption against preemption to interpret the Compact. Although an interstate compact is a federal law, its terms are agreed to by the States themselves. The compromises and mutual cessations of authorities on which the States agree should be interpreted according to the terms of their agreement, without application of a presumption that favors one State's law.

The text of the Compact contains no state-boundary restriction on a State's exercise of its equal right to use the excess water in Reach II, Subbasin 5. By contrast, other Compact provisions that divide multi-state subbasins between States do include a state-boundary restriction, which suggests that no similar restriction was intended in Section 5.05(b)(1).

Furthermore, the limitation of each State to 25% of the excess water indicates that a purpose of Section 5.05(b)(1) is to divide the excess water in the subbasin equally among the four States. An interpretation of the Compact that would allow state laws to prohibit a State from obtaining its 25% share of water would thwart Section 5.05(b)(1)'s guarantee of equal rights to use the excess water in the subbasin.

B. If Texas can access its full 25% share of water from within its borders, Oklahoma laws that barred diversions by Texas water users in Oklahoma would not necessarily be preempted by the Compact. That issue was not resolved by the courts below. Moreover, the available record with respect to Section 5.05(b)(1) has not been fully developed. Accordingly, after correcting

the basic errors in the court of appeals' decision, the Court may wish to remand the case for the lower courts to review all relevant materials that could shed light on the parties' intent with respect to Section 5.05(b)(1).

C. If the Court determines that Oklahoma may not categorically bar Texas water users from accessing Reach II, Subbasin 5 water in Oklahoma, there would remain many complicated questions that could affect whether petitioner is entitled to divert water in any specific amount and from any specific location in Reach II, Subbasin 5. Those questions would need to be addressed in additional proceedings, perhaps in the first instance by the OWRB in acting on petitioner's permit application, or in a suit between or among compacting States.

II. Once the question of whether the Compact enables a State to access any portion of its Reach II, Subbasin 5 water from outside of its boundaries is resolved, the Commerce Clause has no role to play. If Texas water users may access a portion of Texas's share of Reach II, Subbasin 5 water in Oklahoma, then it is the Compact, not the Commerce Clause, that prohibits respondents from enforcing Oklahoma laws that would bar such access.

ARGUMENT

I. OKLAHOMA MAY NOT CATEGORICALLY FORECLOSE TEXAS WATER USERS FROM DIVERTING REACH II, SUBBASIN 5 WATER IN OKLAHOMA, AT LEAST WHERE SUCH A PROHIBITION WOULD PREVENT TEXAS FROM EXERCISING ITS "EQUAL RIGHT[]" TO USE EXCESS WATER IN THE SUBBASIN

A. The Compact Does Not Allow A State To Enforce State Laws That Would Prevent Other States From Obtaining Their Share Of Reach II, Subbasin 5 Water

Section 5.05(b)(1) of the Compact provides that, so long as there is a flow of 3000 cubic feet per second or more at the Arkansas-Louisiana border, the compacting States have "equal rights" to the use of the excess water in Reach II, Subbasin 5, and "no state is entitled to more than 25 percent of the [excess] water." 94 Stat. 3311. The court of appeals held that Section 5.05(b)(1) entitles each compacting State only "to use up to 25 percent of the excess water *in its state*," but not to divert any water outside its own boundaries. Pet. App. 42a-43a (emphasis added). In reaching that conclusion, the court of appeals erroneously applied a presumption against preemption and misread general Compact provisions concerning state administration of water rights in a way that could allow one State to prevent other States from exercising their "equal rights" to use the excess water in the subbasin.

An interstate compact is "a contract * * * that must be construed and applied in accordance with its terms." *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987) (citation omitted). This Court has stated that, "[a]s with all contracts, we interpret [a] Compact according to the intent of the parties." *Montana* v. *Wyoming*, 131 S. Ct. 1765, 1771 n.4 (2011). The bargaining history of a compact is

relevant extrinsic evidence that may be used to discern the parties' intent with respect to compact terms. See *Oklahoma* v. *New Mexico*, 501 U.S. 221, 233-238 (1991). Evidence concerning the parties' course of performance may similarly shed light on their intent with respect to the Compact's terms. *Alabama* v. *North Carolina*, 130 S. Ct. 2295, 2309 (2010). At the same time, congressional approval transforms an interstate compact into a law of the United States, and the Compact therefore must also be interpreted as a federal statute. *New Jersey* v. *New York*, 523 U.S. 767, 811 (1998).

In the view of the United States, based on the text of the Compact and the record as developed below and before this Court, the best reading of the Compact is that it does not allow Oklahoma categorically to foreclose Texas water users from accessing Reach II, Subbasin 5 water in Oklahoma, at least to the extent such a prohibition would prevent Texas from exercising its "equal right[]" to use excess water in the subbasin. As explained below, however, the record concerning the drafting of the Compact and factual issues that could be relevant to the disposition of the case were not fully developed below, and the additional documents included by the parties for the first time in the Joint Appendix do not include what we understand from the parties to be a range of further materials, which could also be relevant to the ultimate resolution of petitioner's efforts to obtain water from within Oklahoma. Accordingly, after correcting several basic errors by the court of appeals, the Court may wish to vacate the judgment below and remand for further proceedings.

1. A presumption against preemption should not be applied in interpreting Section 5.05(b)(1)

As an initial matter, the court of appeals erred in relying on a presumption against preemption in determining whether the challenged Oklahoma statutes conflict with Section 5.05(b)(1) of the Compact. Pet. App. 29a, 34a, 40a, 41a, 43a. The court was of the view that such a presumption was "particularly strong in this case" because water administration is an area of "longstanding state regulation." *Id.* at 34a-35a. To the contrary, a presumption against preemption is out of place in interpreting an interstate compact.

This Court has applied a presumption against preemption when a controversy concerns "whether a given state authority conflicts with, and thus has been displaced by, the existence of federal government authority." *New York* v. *F.E.R.C.*, 535 U.S. 1, 17-18 (2002); see, *e.g.*, *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996); *Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 518-519 (1992); *Hillsborough Cnty.* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985). The Court has found such an approach appropriate in those circumstances "because respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt'" state law. *Wyeth* v. *Levine*, 555 U.S. 555, 565 n.3 (2009) (quoting *Lohr*, 518 U.S. at 485). That rationale is not relevant to deciding whether state law conflicts with an interstate compact.

An interstate compact approved by Congress is a federal law, see *Cuyler* v. *Adams*, 449 U.S. 433, 440 (1981), but it is not one imposed by Congress on the States. See *Oklahoma* v. *New Mexico*, 501 U.S. 221, 245 (1991) (Rehnquist, C.J., concurring in part and dissenting in part) ("Congressional consent elevates an inter-

state compact into a law of the United States, yet it remains a contract which is subject to normal rules of enforcement and construction."). The compact is instead a collaborative effort among States to formulate a solution to a common problem, which is later given the status of federal law when the agreement is presented by the compacting States and approved by Congress. The States themselves create the terms of the Compact, and a general assumption that "*Congress* does not cavalierly pre-empt state law" based on its respect for the States as independent sovereigns, see *Wyeth*, 555 U.S. at 565 n.3 (citation omitted; emphasis added), therefore sheds little light on the Compact's interpretation.

Moreover, an interstate compact ordinarily embodies a number of compromises and mutual cessions of rights or regulatory authorities that the States might otherwise claim. See, *e.g.*, *Kansas* v. *Colorado*, 533 U.S. 1, 20 (2001) (O'Connor, J., concurring in part and dissenting in part) ("A compact * * * represents a bargained-for exchange between its signatories."). A generalized presumption against preemption is out of place in determining whether certain rights or regulatory authorities of one signatory State or another on a particular issue have been retained or given up, in whole or in part, through the Compact.

2. The text of Section 5.05(b)(1) does not impose a state-boundary restriction on a State's exercise of its "equal right[]" to use the excess water in Reach II, Subbasin 5

The text of the Compact does not contain a state-boundary restriction on a State's ability to use the excess water in Reach II, Subbasin 5. Section 5.05(b)(1) of the Compact provides that when the flow of the Red River at the Arkansas-Louisiana border is 3000 cubic

feet per second or more, "[t]he Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, * * * provided no state is entitled to more than 25 percent of the [excess] water." 94 Stat. 3311. Subbasin 5 encompasses parts of three States, see § 5.05(a), 94 Stat. 3311, and the provision makes no reference to state boundaries in its description of those States' "equal rights" to use the excess water in the subbasin. § 5.05(b)(1), 94 Stat. 3311.

Although the absence of any reference to state boundaries in Section 5.05(b)(1) may not in itself be sufficient to sustain petitioner's argument that it may divert Reach II, Subbasin 5 water in Oklahoma, other provisions of the Compact provide further context. In other Compact provisions that divide the water of a multi-state subbasin between States, the Compact does provide a geographic limitation on a State's allocated share of water, and therefore on a State's right of access to such water. For example, the Compact divides Reach II, Subbasin 3 between Oklahoma and Arkansas and provides that "[t]he States of Oklahoma and Arkansas shall have free and unrestricted use of the water of this subbasin *within their respective states*," subject to certain downstream flow requirements. § 5.03(b), 94 Stat. 3310 (emphasis added). Similarly, the Compact divides Reach III, Subbasin 3 between Texas and Louisiana and provides that "Texas and Louisiana *within their respective boundaries* shall each have the unrestricted use of the water of this subbasin," subject to certain other requirements. § 6.03(b), 94 Stat. 3313 (emphasis added). And within Section 5.05 itself, the Compact requires upstream States to allow specific quantities of water "within their respective states" to flow downstream during

certain low-flow periods. See §§ 5.05(b)(3) and (c), 94 Stat. 3311-3312. The parties' inclusion of a state-boundary restriction or requirement in other allocation provisions suggests that no similar restriction was intended for Reach II, Subbasin 5. Cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

3. The application of state laws that would prevent a State from exercising its "equal right[]" to use excess water in Reach II, Subbasin 5 would stand as an obstacle to the Compact's allocation of the excess water in that subbasin

a. The Compact's grant of "equal rights" to use the excess water in Reach II, Subbasin 5, coupled with the directive that "no state is entitled to more than 25% of the [excess] water," is also significant. § 5.05(b)(1), 94 Stat. 3311. The 25% limitation indicates that a purpose of Section 5.05(b)(1) is to allocate to each of the four States an equal one-fourth share of the excess water in Reach II, Subbasin 5. That understanding is reinforced by the rules developed by the Red River Compact Commission's Engineering Advisory Committee, and approved by the Commission, to compute and enforce compliance with Section 5.05. See 1 J.A. 55, Red River Compact Interim Rules and Regulations Rule 5(a)(2) (stating that when the total runoff and undesignated flow is between 7500 and 12,000 cubic feet per second, "Louisiana's allocation shall be 3,000 cfs and each of the three upstream states will *equally share* the runoff and undesignated flow in excess of 3,000 cfs") (emphasis added); *ibid.*, Rule 5(a)(3) (stating that when the total runoff and undesignated flow is 12,000 cubic feet per second or more, "each of the signatory states *shall be entitled to 25% of the total* runoff and undesignated flow") (emphasis added). The application of state laws that

would prevent a State from obtaining its equal share (its full 25% entitlement) of Reach II, Subbasin 5 water would thwart Section 5.05(b)(1)'s guarantee of equal rights to use the excess water in the subbasin.

b. The court of appeals concluded that the purpose of Section 5.05(b) is simply "to ensure that an equitable share of water from the subbasin reaches the states *downstream* from Oklahoma and Texas," Pet. App. 36a (emphasis added), and therefore did not create any rights and obligations as between Oklahoma and Texas. The court similarly read the interpretive comments to indicate that Section 5.05(b) is designed to ensure adequate downstream flows and nothing more. *Id.* at 39a. But Section 5.05(b) does more than protect downstream States, and specifically Louisiana. Section 5.05(b)(2)-(3) and (c) do establish downstream flow requirements during low-flow periods, and thereby ensure an equitable flow to Louisiana. But those provisions accomplish that purpose in a manner that also provides for equitable sharing of the burden of doing so among the three upstream States of Arkansas, Oklahoma, and Texas. § 5.05(b)(2)-(3) and (c), 94 Stat. 3311-3312.

Section 5.05(b)(1), at issue here, apportions the subbasin's excess water in *non*-low-flow periods, *i.e.*, when the flow *exceeds* 3000 cubic feet per second at the Arkansas-Louisiana border. Under those conditions, all four States have "equal rights" to use of the excess water, enforced by a 25% cap on the amount any one State can use. To be sure, that provision serves to ensure that Louisiana (as well as Arkansas) will receive a 25% share. But the provision for equal rights and an equal cap also protects Texas and Oklahoma, including as against each other. The interpretive comments recognize that further purpose by explaining that "[w]hen the flow is high,

* * * all states are free to use whatever amount of water they can put to beneficial use," and that "[i]f the states have competing uses and the amount of water available in excess of 3000 [cubic feet per second] cannot satisfy all such uses, each state will honor the other's right to 25% of the excess flow." 1 J.A. 29-30.[7]

The court of appeals' conclusion that Section 5.05(b) is concerned only with downstream delivery requirements is further undermined by another portion of the interpretive comments "emphasiz[ing] that * * * periods of low flow on the mainstem are relatively rare," and that "[f]lows less than 3000 [cubic feet per second] have [historically] occurred only 4.2% of the time." 1 J.A. 30. Given that there was excess water in Reach II, Subbasin 5 the vast majority of the time, it is logical to assume that dividing the excess water in the subbasin among the four States on an equal basis was at least as much of a concern to the compacting States as ensuring flows for downstream States.

c. The court of appeals also identified several "[g]eneral [p]rovisions" of the Compact that in its view "demonstrate pronounced federal deference to state wa-

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[7] If Section 5.05(b)(1) protected only the downstream States of Arkansas and Louisiana by ensuring that they each are able to use up to 25% of the total excess water in Subbasin 5—and if, as petitioner asserts (Pet. Br. 2, 9 & n.5), more than 25% of the total excess water is in Oklahoma and less than 25% is in Texas—then the result of the court of appeals' (and apparently respondents') interpretation would be that Texas alone among the compacting States would be unable to use 25% of the subbasin's excess water. That result would not only be inconsistent with Section 5.05(b)(1)'s conferral of "equal rights," but also would effectively leave a portion of the total excess water unallocated, contrary to the evident purpose of the Compact to allocate all water in the covered reaches of the Red River. § 1.01(b) and (e), 94 Stat. 3305-3306.

ter law," and it concluded based on those provisions that "[t]he Compact's general policy is to give the Compact states unrestricted authority to regulate their apportioned water." Pet. App. 35a. That conclusion of course begs the question of what the States' "apportioned water" *is*. Moreover, the Compact's general provisions cannot be read to override its specific allocations, and thus do not support a conclusion that Oklahoma may categorically bar Texas water users from accessing a portion of *Texas's* share of Reach II, Subbasin 5 water in Oklahoma, at least when doing so is necessary to enable Texas to use the full amount of its 25% share.

Indeed, the general provisions of the Compact on which the court of appeals relied make clear that a State's regulation of water use within its boundaries must be consistent with the allocations made under the Compact. Section 2.01 provides that "[e]ach state may freely administer water rights and uses in accordance with the laws of that state, *but such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact.*" § 2.01, 94 Stat. 3306 (emphasis added). Similarly, Section 2.10(a) provides that "[n]othing in this Compact shall be deemed to * * * [i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, *not inconsistent with its obligations under this Compact.*" 94 Stat. 3306-3307 (emphasis added). The interpretive comments repeat that limitation. See 1 J.A. 14 ("*Subject to the general constraints of water availability and the apportionment of the Compact*, each state is free to continue its existing internal water administration, or to modify it in any manner it deems appropriate.") (emphasis added).

Under those general provisions of the Compact, the States retain authority to enforce state water laws within their boundaries, but they may not enforce those laws if doing so would prevent another State from obtaining and putting to beneficial use its allocated share of water. In those circumstances and to that extent, the state laws would conflict with the Compact's terms and frustrate the accomplishment of its purposes, and must give way. See *Hines* v. *Davidowitz*, 312 U.S. 52, 62-63 (1941).

B. Further Development Of The Record Is Necessary To Determine Whether Respondents' Enforcement Of Any Oklahoma Laws That Would Prohibit Petitioner From Diverting Reach II, Subbasin 5 Water In Oklahoma Would Violate The Compact

1. There are unresolved factual issues concerning whether Texas can access its share of Reach II, Subbasin 5 water from within its borders

The court of appeals erred by applying a presumption against preemption and by interpreting general Compact provisions concerning state administration of water rights to allow Oklahoma categorically to bar Texas from diverting any portion of its share of Reach II, Subbasin 5 water from outside of its boundaries. There is a further question, however, whether the Compact entitles each State to divert Reach II, Subbasin 5 water out of state as a matter of course, or whether a State may be entitled to do so only when it cannot obtain full access to its equal share of water within its boundaries.

Although the language of the Compact suggests that state laws concerning the administration of water rights would be preempted to the extent those laws would prevent another State from accessing its allocated share of Compact water, such laws would not necessarily be preempted if they were enforced against a compacting

State that was capable of accessing its share of water from within its own borders. In those circumstances, enforcement of the state laws would not appear to frustrate the purpose of the allocation of Reach II, Subbasin 5 water provided by Section 5.05(b)(1). Indeed, if a State had access to its 25% share of water from within its borders but endeavored to take all or part of its share from within another State, that could prevent *the other State* from accessing *its* equal share of Reach II, Subbasin 5 water, and could unnecessarily intrude upon the authority of *the other State*, recognized in Sections 2.01 and 2.10(a) of the Compact, to freely administer water rights and regulate the use and control of water within *its* borders. 94 Stat. 3306-3307.

Petitioner argued below that Texas could not fully access its share of Reach II, Subbasin 5 water from within its borders because "the part of Texas located within Reach II, Subbasin 5 contains primarily intermittent streams and dry arroyos yielding a small fraction of the total water flowing in Subbasin 5." Pet. App. 41a (citation omitted). The district court granted summary judgment in favor of respondents before petitioner presented any evidence on that point. See *id.* at 44a n.3. The court of appeals acknowledged that the parties disputed "whether Texas can receive a 25% share of the excess water in the Texas part of Reach II, Subbasin 5," but the court concluded that resolution of that factual dispute was "not necessary to [its] disposition of this issue because * * * [Section] 5.05(b)(1) does not allocate water located in Oklahoma to Texas regardless of what amount of water [petitioner] and other Texas users can appropriate in Texas." *Ibid.*

Moreover, although the main stem of the Red River passes through or borders each of the compacting

States, it does not necessarily follow that each State could access its share of Reach II, Subbasin 5 water from within its borders by diverting water from the River's main stem. The northern border of Texas with Oklahoma east of the Texas panhandle is the Red River's south vegetation line, such that the main stem of the River is located entirely within Oklahoma. See Red River Boundary Compact, Pub. L. No. 106-288, 114 Stat. 919; *United States* v. *Texas*, 162 U.S. 1, 90-91 (1896); *Texas* v. *Oklahoma*, 457 U.S. 172, 172 (1982). Although it is conceivable that there are ways to divert main stem water from within Texas's northern border—*e.g.*, by placing an intake pipe at the mouth of a Texas tributary just as it is about to join the main stem—the court of appeals' interpretation of the Compact would appear to prohibit petitioner from diverting water directly from the river's main stem, which is in Oklahoma. Cf. *New Jersey* v. *Delaware*, 552 U.S. 597, 615, 623 (2008) ("New Jersey's regulatory authority is qualified once the boundary line at low water is passed," and "it was within Delaware's authority to prohibit construction * * * within its domain").

There may be still further issues concerning the quality of the water in the main stem of the Red River. There is a factual question about whether the water in the main stem within Reach II, at least in the segments immediately north of Texas's border with Oklahoma and Arkansas, is too saline to be used for irrigation, drinking, or other purposes. The issue of salinity in the river's main stem was known to the States when they entered into the Compact. The interpretive comments note that "[n]atural salt pollution in the Red River Basin is * * * seriously detrimental to all states." 1 J.A. 48. And an officer of the U.S. Army Corps of Engineers

stated in a hearing on the Compact that "[t]he Red River main stem flows cannot be used for many purposes due to the chloride contamination from natural and manmade sources," but that "[g]enerally, most tributary flows are suitable for domestic and industrial use with normal treatment." *Red River Compact and Caddo Lake Compact: Hearing Before the Subcomm. on Admin. Law & Governmental Relations of the House Comm. on the Judiciary*, 96th Cong. 2d Sess. 6 (1980) (statement of Colonel Alan L. Laubscher, Assistant Director of Civil Works).[8] On the other hand, there is evidence that Texas water users are treating and using water from Lake Texoma, which is immediately west of Reach II, Subbasin 5, for municipal purposes. See U.S. Army Corps of Engineers, Public Notice, Permit No. SWT-0-01311, http://rec-swt.usace.army.mil/permits/permitdetail.cfm?PublicNoticeApplicationNumber=SWT-0-1311 (last visited Feb. 26, 2013).

Such considerations may or may not have influenced the States' understanding of how excess water in Reach II, Subbasin 5 would be apportioned among them or how Texas's equal right to use excess water in that subbasin could be exercised. It is possible, for example, that notwithstanding any salinity concerns, the States nonetheless contemplated that all States would divert their shares from tributaries within their borders and from the main stem, and that they assumed Texas would be

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[8] The salinity of the main stem is diluted by freshwater sources flowing into the river as it flows east and south. See U.S. Geological Survey, *Assessment of Selected Water-Quality Data Collected in the Lower Red River (Main Stem) Basin, Texas, 1997-98* 4 (Nov. 2003) (noting that the lowest salinity levels for sites tested in the study was at Index, Arkansas), http://pubs.usgs.gov/fs/fs10603/pdf/FS_106-03.pdf.

able to draw water directly from the main stem even though the main stem lies outside its borders.[9]

If the Court concludes that the court of appeals erred by applying a presumption against preemption and by reading the general provisions of the Compact concerning the States' administration of water rights to allow Oklahoma categorically to prohibit water users in other States from accessing Reach II, Subbasin 5 water within Oklahoma, then whether Texas can divert 25% of the water in Reach II, Subbasin 5 from within its borders may be relevant to the issue of preemption. The Court therefore may wish to consider remanding the case to the district court for consideration of whether Texas may access a portion of its share of Reach II, Subbasin 5 water in Oklahoma, taking into account any relevant legal and factual issues.

2. The record concerning the parties' intent with respect to Section 5.05(b)(1) was not fully developed in the proceedings below

In other respects as well, the record with respect to Section 5.05(b)(1) was not fully developed in the proceedings below. The district court granted summary judgment in favor of respondents, and in doing it so rendered an interpretation of the Compact before the parties had presented detailed arguments and materials concerning the meaning of Section 5.05(b)(1).

Respondents' exhibit list for trial included minutes from some portion of the meetings among representa-

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[9] See, *e.g.*, See 1 J.A. 59-63, Red River Compact Interim Rules and Regulations Rule 6 (procedures to compute state runoff, undesignated inflows, and flow of the Red River at the Arkansas-Louisiana boundary; reflecting an assumption that States would divert water from particular segments of the main stem).

tives negotiating the Compact, but those minutes were not addressed by the parties or attached to any pretrial motion for the district court's consideration. See C.A. App. 770-772; 2 J.A. 27-304. Furthermore, there was evidence submitted to the district court in support of petitioner's motion for a temporary restraining order, but not attached to any pretrial motion, showing that petitioner previously made an offer to purchase Reach II, Subbasin 5 water from Oklahoma and the Choctaw and Chickasaw Nations. See C.A. App. 96-98 (affidavit of Robert Smith); 2 J.A. 336-382 (status report on water compact). The negotiating history of a compact and the parties' course of performance under it are relevant to discerning the parties' intent with respect to compact terms. See *Oklahoma* v. *New Mexico*, 501 U.S. at 233-238; *Alabama* v. *North Carolina*, 130 S. Ct. at 2309.

The Compact had an extensive negotiation history. See generally Marguerite A. Chapman, *Where East Meets West in Water Law: The Formulation of an Interstate Compact to Address the Diverse Problems of the Red River Basin*, 38 Okla. L. Rev. 1 (1985). In addition to the additional materials included in the Joint Appendix in this Court, which were not presented to or considered by the district court, there exist various pre-execution and post-execution documents (several of which petitioner has sought leave to lodge with the Clerk of this Court) that may further illuminate the parties' intent with respect to Section 5.05(b)(1). The parties have informed this Office that there are, for example, drafts of the Compact, additional negotiating minutes, minutes and reports from the Engineering Advisory Committee, and letters exchanged between Compact negotiators. Recognizing that it is "a court of review, not of first view," this Court does not typically re-

view such materials in the first instance or reach issues that "were not addressed by the [c]ourt of [a]ppeals." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). A broader remand may therefore be appropriate for further development of the record with respect to Section 5.05(b)(1).

C. Additional Proceedings Would In Any Event Be Required In Some Forum To Determine Whether Petitioner's Permit Application Should Ultimately Be Granted

Although vacatur of the judgment of the court of appeals would reopen the door for petitioner to obtain the relief it has sought in this case—*i.e.*, declaratory and injunctive relief prohibiting respondents from applying Oklahoma laws that would absolutely bar petitioner from obtaining a permit to divert Reach II, Subbasin 5 water in Oklahoma, see Pet. App. 2a—there would remain many complicated questions concerning whether petitioner would ultimately be entitled to obtain a permit to divert water in any specific amount and from any specific location within Oklahoma. Those questions would need to be addressed in additional proceedings, perhaps in the first instance by the OWRB in acting on petitioner's permit application, or in a suit involving additional parties (*i.e.*, in a suit between or among compacting States, either in this Court or in the district court, see n.5, *supra*).

The permit application at issue in this case sought to appropriate 310,000 acre feet per year of surface water from the Kiamichi River in Oklahoma. 2 J.A. 8-26. Although Section 5.05(b)(1) may allow Texas water users to access a portion of Texas's allocated share of Reach II, Subbasin 5 water in Oklahoma in some circumstances, that ability would not directly entitle petitioner to a permanent appropriation of 310,000 acre feet per year of

surface water from Reach II, Subbasin 5, from either the Kiamichi or the main stem. Texas is not entitled to a fixed quantity of water under the Compact; it is entitled to use 25% of the excess water in the subbasin, and that quantity will change over time with changes in precipitation and perhaps changes in uses of water in tributaries upstream of Subbasin 5. § 5.05(b)(1), 94 Stat. 3311.[10]

There would also be factual and legal questions regarding how much water is practicably available at any given time for the compacting States to divide equally among themselves. As noted above, if the water in some segments of the Red River's main stem is too saline to be useable, as petitioner contends, then there could be a question about the relevance of that fact to Texas's exercise of "equal rights" to the use of excess water. Computation of the amount of excess water may also require the States to create or enforce accounting procedures designed to measure the runoff originating in the subbasin and the undesignated water flowing into the subbasin. The competing interests of water users in Oklahoma and other compacting States in diverting water from a particular point within the subbasin, in addition to environmental and other restrictions, may also be relevant to whether a particular diversion by Texas water users should be allowed.

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[10] Water flows into Subbasin 5 from the other four subbasins of Reach II. Subbasin 1 is apportioned to Oklahoma, see § 5.01(b), 94 Stat. 3310; Subbasins 2 and 4 are apportioned to Texas, see §§ 5.02(b), 5.04(b), 94 Stat. 3310-3311; and Subbasin 3 is divided between Oklahoma and Arkansas, § 5.03(b), 94 Stat. 3310. Section 2.04 of the Compact provides that "[t]he failure of any State to use any portion of the water allocated to it shall not constitute relinquishment or forfeiture of the right to such use." 94 Stat. 3306.

The outcome of other legal proceedings could also have an effect on the amount of excess water available in the subbasin. The United States, the OWRB, and the Choctaw and Chickasaw Nations are currently involved in litigation and mediation over the rights asserted by the Choctaw and Chickasaw Nations to water within their historic treaty territory, which includes areas encompassed by Reach II, Subbasin 5. See *Oklahoma Water Res. Bd* v. *United States*, No. 5:12-cv-00275-W (W.D. Okla. Mar. 12, 2012); *Chickasaw Nation* v. *Fallin*, 5:11-cv-000927-W (W.D. Okla. Aug. 18, 2011). The Compact protects any such rights by expressly providing that "[n]othing in this Compact shall be deemed to impair or affect the powers, rights, or obligations of the United States, or those claiming under its authority, in, over and to water of the Red River Basin." § 2.07, 94 Stat. 3306. Accordingly, resolution of issues concerning the Nations' water rights could affect the amount or location of available excess water, and any such rights cannot be impaired by a State's efforts to obtain its share of Reach II, Subbasin 5 water.[11]

II. THE COURT OF APPEALS' COMMERCE CLAUSE HOLDING WAS UNNECESSARY

At this stage, the parties' dispute requires nothing more than an interpretation of the Compact and its preemptive force. Once the question whether the Compact enables a State to access any portion of its share of Reach II, Subbasin 5 water from outside of its borders is resolved, the Commerce Clause has no role to play. In this Court, petitioner is asserting a right only to access

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[11] Any proceedings on remand in this case would not require, and should not include, the resolution of any issues concerning the Choctaw and Chickasaw Nations' water rights.

water that, under its interpretation of the Compact, is allocated to Texas. Petitioner is not asserting a right to access water that is allocated to Oklahoma. See Pet. Br. 47 n.13. The court of appeals' Commerce Clause holding was based on its conclusion that the water petitioner sought to access was allocated to Oklahoma under the Compact. See Pet. App. 27a ("Taken together, the Compact provisions * * * give the Oklahoma Legislature wide latitude to regulate interstate commerce *in its state's apportioned water.*") (emphasis added). That Commerce Clause holding would not apply to water that is allocated to Texas under the Compact. And if petitioner is correct that Texas water users may not be altogether barred from accessing Texas's allocated share of Reach II, Subbasin 5 water in Oklahoma, at least in some circumstances, then it is the Compact, not the Commerce Clause, that prohibits respondents from enforcing state laws that would bar such access. See pp. 13-22, *supra*.[12]

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[12] The separate question whether the Commerce Clause is implicated if Oklahoma anti-export laws prohibited Oklahoma appropriators from selling water to Texas water users is not presented in this case.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings consistent with the Court's decision.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,

Petitioner,

v.

RUDOLF JOHN HERRMANN ET AL.,

Respondents.

On Writ Of Certiorari to the United States Court of Appeals for the Tenth Circuit

AMICI CURIAE BRIEF OF THE CITIES OF ARLINGTON AND FORT WORTH, TEXAS, IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI*[1]

The City of Arlington and the City of Fort Worth are part of one of Texas's most vibrant and booming areas: the Dallas-Fort Worth metroplex. They purchase all of their raw water from petitioner and are petitioner's two largest customers. Freese & Nichols, Inc., *et al.*, *2011 Region C Water Plan* at 1.48, app. C (tbls. C-11 & C-129) (Oct. 2010), http://tinyurl.com/tarrant1. Together, *amici* account for about 75% of petitioner's annual water sales. See *id.* at 1.48–1.49.

State and regional water plans anticipate substantial population growth in the City of Arlington and the City of Fort Worth during the next fifty years. But their existing water supplies—and, in particular, the supplies available to them from petitioner—will fall well short of the corresponding increase in demand. Regional water-management plans therefore call upon petitioner, along with other area water suppliers, to develop new water sources to meet expected future needs.

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[1] No counsel for a party wrote this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae* and its counsel made a monetary contribution to this brief's preparation or submission. Both petitioner and respondents have filed blanket consents to *amicus* briefs; the consents are reflected on the Court's docket.

The City of Arlington lies at the center of the Dallas-Fort Worth metroplex. In 2010, its population was 380,628, and it is expected to grow to 472,065 by 2060. *2011 Region C Water Plan* app. C (tbl. C-11). Arlington's demand for water is projected to increase by 30% during that time. *Ibid.*; see also *id.* at 2.25 (tbl. 2.21).

The City of Fort Worth is the largest municipality in the Tarrant Regional Water District, and it is petitioner's largest customer. In addition to its own water uses, Fort Worth also provides water to smaller municipalities nearby. *2011 Region C Water Plan* at 1.49. Fort Worth's 2010 population of 742,597 is expected to increase to 2,161,533 by 2060. *Id.* app. C (tbl. C-129). Its demand for water is projected to increase 141% during that time. *Ibid.*; see also *id.* at 2.25 (tbl. 2.21).

It is overwhelmingly important to *amici* that petitioner will be able to supply enough water to keep pace with growing demand. Indeed, petitioner's capacity to do so will be critical to the economic vitality and quality of life in both cities and in the surrounding region. Comprehensive water-management plans have identified the availability of additional water from petitioner as one of *amici*'s "recommended strategies." *2011 Region C Water Plan* at ES.49; see also *id.* app. C (tbls. C-11 & C-129). *Amici* accordingly have a substantial interest in petitioner's ability to obtain that additional water supply as reliably and efficiently as possible.

INTRODUCTION AND SUMMARY OF ARGUMENT

Interstate water compacts routinely allocate water between States through equitable apportionments untethered from state borders. Under such compacts, States often need to obtain some of their share from within another State. Indeed, the purpose of these compacts is to promote cooperation and comity between States that share a river basin. And they do so by putting each State's access to a fair share of the available water before the historical happenstances of political cartography.

At the same time, those same interstate water compacts generally preserve each State's residual authority to regulate water inside its own borders—but only insofar as those state regulations are "not inconsistent with [the State's] obligations" under the compact. 1JA12 (Red River Compact, Pub L. No. 96-564, § 2.10, 94 Stat. 3305 (1980)). Likewise, these compacts often permit a State to make any beneficial use of the water apportioned to it. See 1JA10 (§ 2.01). But when compacting States want to *protect* designated state authority from any conflict with their compact's obligations, they do so clearly. See *infra* pp. 12–13.

The court of appeals here, however, read the Red River Compact's commonplace nod to consistent state laws, and its granting of permission for any beneficial use of the apportioned water, to allow a State to trump the explicit division of water rights. In the relevant subbasin of the Red River, the Compact gives each State "equal rights" to the water. 1JA25 (§ 5.05(b)). It accordingly prohibits each of the four signatory States from using more than 25%

of that water (when in excess of a minimum downstream flow). *Ibid.* The court of appeals nonetheless concluded that no State's "equal right[]" to that water crosses state lines. See Pet. App. 1a–51a. And so the court upheld Oklahoma's decidedly *unequal* treatment of Texan water purchasers—a legal regime effectively prohibiting Texas's purchase of Oklahoma water to which it was guaranteed an "equal right[]." See *ibid.*; see also Pet. Br. 25–47.

That decision, if upheld, would have far-reaching, negative effects on water consumers in North Texas and elsewhere. Numerous interstate water compacts contain provisions substantially similar to the boilerplate terms upon which the court of appeals relied to trump the compact's equal apportionment of water. The decision below therefore calls into question whether other States will continue to enjoy access to their fair and agreed-upon share of interstate water under those compacts.

Affirmance also would have a devastating effect on water management in North Texas. State and regional planners are counting on water located in Oklahoma—within Texas's apportionment under the Red River Compact—to meet the demands of a relentlessly increasing population. What is more, recurring drought and the uncertainty of future climatic conditions make the need to identify new water sources particularly pressing. Planners have determined that it would be environmentally and economically advantageous for petitioner to obtain a share of the subbasin's water from inside Oklahoma.

If Oklahoma is permitted to continue preventing Texas's water suppliers from accessing reliable, efficient, and underutilized water just inside

Oklahoma's border, then petitioner will be forced to find other sources to provide its customers hundreds of thousands of acre-feet per year of water. Those alternatives are generally less reliable, may pose a greater environmental impact, and will require significant additional expense by the region's water consumers. Meanwhile, abundant and accessible water lies just over the Oklahoma border, where it is indisputably subject to the apportionment agreed upon in the Red River Compact.

ARGUMENT

I. The Decision Below Threatens Numerous Interstate Compacts That Apportion Water Across State Borders

The decision below upheld an Oklahoma law that is fundamentally inconsistent with the Red River Compact because it deprives Texas of its "equal right[]" to the water in Reach II, Subbasin 5. 1JA25 (Red River Compact § 5.05(b)(1)). The Compact nowhere limits Texas's "equal right[]" to that water. And yet Oklahoma's protectionism indisputably prevents Texas from acquiring *any* of its share of the subbasin's water from inside Oklahoma. See Pet. App. 2a–10a.

In reaching that conclusion, the Tenth Circuit misinterpreted boilerplate interstate-compact provisions that preserve each State's residual authority to enact laws "not inconsistent with" the Compact, 1JA12 (§ 2.10(a)), and authorizing any beneficial use of a State's apportioned water subject to the Compact's water apportionment to other States as well, 1JA10 (§ 2.01). See Pet. App. 23a–26a, 35a, 42a. The court erroneously concluded that these

provisions mean that the Red River Compact was intended to *expand* each State's "broad regulatory authority" and "wide latitude" to control *any* water that is found within its borders—whether or not "equal rights" to that water are to be shared among the Compact's signatory States. Pet. App. 27a.

That reasoning is deeply flawed. A compact's preservation of non-conflicting state laws does not establish that restrictions on cross-border access to shared water are non-conflicting. And a compact's statement that the signatory States may use their share of water for any beneficial use does not authorize one State to block another State from exercising its own "equal right[]" to make beneficial use of that water. 1JA25 (Red River Compact § 5.05(b)(1)); see also Pet. Br. 38–41.

The court of appeals' contrary conclusion threatens settled expectations of Texas, which entered into the Red River Compact on the reasonable belief that its provisions would be given their plain and ordinary meaning. Moreover, the decision below threatens the expectations and water plans of other States, municipalities, and consumers who also depend on having access to water apportioned to them—irrespective of state borders—under interstate compacts that contain similar provisions.

A. Numerous interstate water compacts divide water rights between States and contemplate that those States will have access to some of their share from within other States. Indeed, an essential function of interstate water compacts is to allocate water on a basis other than geographical happenstance. The very nature of these agreements is to

avoid certain States exercising unilateral control over water that is found within their boundaries, to the detriment of other States.

Just like the Red River Compact, 1JA12 (§ 2.10(a)), those compacts routinely preserve state water laws that are "not inconsistent" with those obligations. A few examples demonstrate the frequency with which compacts include a boilerplate provision preserving *consistent* state laws. A number of compacts use language virtually identical to that found in Section 2.10 of the Red River Compact:

- The Big Blue River Compact between Kansas and Nebraska provides that "[n]othing contained in this Compact shall be deemed * * * [t]o interfere with or impair the right or power of either signatory State to regulate within its boundaries the appropriation, use, and control of waters within that State *consistent with its obligations under this Compact*." Pub. L. No. 92-308, art. VII, § 7.2(3), 86 Stat. 193, 198 (1972) (emphasis added).

- The Pecos River Compact between Texas and New Mexico provides that "[t]he provisions of this Compact shall not apply to, or interfere with, the right or power of either signatory state to regulate within its boundaries the appropriation, use and control of water, *not inconsistent with its obligations under this Compact*." Pub. L. No. 81-91, art. VIII, 63 Stat. 159, 164 (1949) (emphasis added).

- The Snake River Compact between Idaho and Wyoming provides that "[t]he provisions of this compact shall not apply to or interfere with the

right or power of either state to regulate within its boundaries the appropriation, use and control of waters *allocated to such state by this compact*." Pub. L. No. 81-464, art. IX, 64 Stat. 29, 33 (1950) (emphasis added).

- The Upper Colorado River Basin Compact among Arizona, Colorado, New Mexico, Utah, and Wyoming provides that "[t]he provisions of this Compact shall not apply to or interfere with the right or power of any signatory state to regulate within its boundaries the appropriation, use and control of water, *the consumptive use of which is apportioned and available to such State by this Compact*." Pub. L. No. 81-37, art. XV(b), 63 Stat. 31, 41 (1949) (emphasis added).

- The Alabama-Coosa-Tallapoosa River Basin Compact between Alabama and Georgia provides that "[t]he provisions of this Compact shall not interfere with the right or power of any state to regulate the use and control of water within the boundaries of the state, *providing such state action is not inconsistent with the allocation formula*." Pub. L. No. 105-105, art. XVI, 111 Stat. 2233, 2243 (1997) (emphasis added). See also Apalachicola-Chattahoochee-Flint River Basin Compact (Alabama, Georgia, and Florida), Pub. L. No. 105-104, art. XVI, 111 Stat. 2219, 2229 (1997) (same).

- The Arkansas River Compact of 1965 between Oklahoma and Kansas, provides that "[n]othing in this compact shall be deemed * * * [t]o interfere with or impair the right or power of either signatory state to regulate within its boundaries the appropriation, use and control of waters

within that state *not inconsistent with its obligations under this compact*." Pub. L. No. 89-789, § 107(a), art. XIII(B), 80 Stat. 1409, 1414 (1966) (emphasis added).

- The Canadian River Compact between Texas and New Mexico provides that nothing in the compact shall be deemed as "[a]pplying to, or interfering with, the right or power of any signatory State to regulate within its boundaries the appropriation, use and control of water, *not inconsistent with its obligations under this Compact*." Pub. L. No. 82-345, art. X(d), 66 Stat. 74, 78 (1952) (emphasis added).

Other interstate compacts achieve the same result with slightly different phrasing. The Arkansas River Compact of 1949 between Colorado and Kansas, for example, states that "*Except as otherwise provided*, nothing in this Compact shall be construed as supplanting the administration by Colorado [of its appropriator's rights], nor as interfering with the distribution among said appropriators by Colorado, nor as curtailing the [river's] diversion and use for irrigation and other beneficial purposes in Colorado." Pub. L. No. 81-82, art. VI(A)(2), 63 Stat. 145, 149 (1949) (emphasis added).

A number of interstate compacts, including the Red River Compact, 1JA11 (§ 2.05(c), (d)), also contain provisions that specifically address certain aspects of how States will obtain access to allocated water from across state borders. Those compacts, too, generally preserve *consistent* source-state water regulation where one State wants to access its allocated water inside another State. For example,

the Belle Fourche River Compact between South Dakota and Wyoming recognizes that each State may have to use reservoirs, dams, and other facilities in the other State in order to obtain some of its share of the river's water. Pub. L. No. 78-236, arts. IV–VII, 58 Stat. 94, 96–97 (1944). Applications to do so, according to the compact, would be made "by compliance with the laws of the other State" and "subject to the rights of the other State to control, regulate, and use water apportioned to it." Art. VII(A), 58 Stat. 97; see also art. VII(C), 58 Stat. 97 (providing for adjudication of disputes in accordance with "the laws of the State where the water is stored or diverted"); Republican River Compact, Pub. L. No. 78-60, arts. VII, VIII, 57 Stat. 86, 89 (1943) (providing for cross-border property rights and facilities to provide access to allocated water—all "subject to the laws" of the State where the property or facility is located).

The Red River Compact is no different. Section 2.05(d), for example, provides "[e]ach Signatory State" with access to the "bed and banks of the Red River and its tributaries" for the conveyance of water—irrespective of state borders. 1JA11; see also *ibid.* (§ 2.05(c)) (authorizing reservoir construction, also without any limitation based on state borders). And like other compacts, the Red River Compact permits States to administer water use and rights "in accordance with the laws of that state," but nonetheless makes such local regulation "subject to the availability of water in accordance with the apportionments made by this Compact." 1JA10 (§ 2.01).

In all such cases, providing that cross-border water access will be subject to the "laws of the state" where the water is located does not authorize a State's "wide latitude" (Pet. App. 27a) to *prohibit* cross-border access to apportioned water. And whether or not compacting States include specific provisions addressing such cross-border access to apportioned water, their compacts should not be interpreted to permit outright restrictions on such access simply because they preserve state laws that are *consistent* with the compact's apportionment scheme.

B. Interstate water compacts also routinely address whether any limitations should be imposed on a State's use of its apportioned water. The Red River Compact (1JA10 (§ 2.01)) and a number of others place no restriction on a State's choice among beneficial uses, whereas other compacts limit such uses for things like electricity generation. In either case, these use-related provisions have nothing to do with whether one State may prohibit another from making appropriate use of water rights apportioned to it. That is, a use-related provision says only what one State may do with water appropriated to it under the compact; it does not give one State freestanding authority to countermand the appropriation of water under the compact.

It is in this respect, the Red River Compact provides that "[e]ach Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state." 1JA10 (§ 2.01). Similarly, the Pecos River Compact allocates water between its signatory States and then provides that each State's "[b]eneficial use shall be the basis, the

measure and the limit of the right to use water." Art. VI(f), 63 Stat. 164. The Snake River Compact, by contrast, authorizes any beneficial use of apportioned water, but makes its use "for the generation of electrical power * * * subservient to the use of such waters for domestic, stock and irrigation purposes." Art. V, 64 Stat. 31. The purpose of these kinds of provisions is both clear and limited: They identify the uses to which a State can put its apportioned water after it has obtained it. According to the decision below, however, such provisions would trump the very allocation of water itself.

C. When States intend to ensure that certain state laws will *survive* any conflicting compact provisions—*i.e.*, when States want their own laws to trump a compact—they say so clearly. Such provisions preserve state laws whether or not they are inconsistent with what would otherwise be a State's obligations under the compact. Those state-law carve-outs are 180 degrees different from the Red River Compact's preservation of only those state laws "not inconsistent" with it. 1JA12 (§ 2.10(a)); see *supra* pp. 7–9.

For example, section 14.19 of the Delaware River Basin Compact (among Delaware, New Jersey, New York, and Pennsylvania) states that "[n]othing contained in this compact shall be construed as affecting or intending to affect or in any way to interfere with the law of the respective signatory parties relating to riparian rights." Pub. L. No. 87-328, 75 Stat. 688, 712 (1961). Section 15.19 of the Susquehanna River Basin Compact (among Pennsylvania, Maryland, and New York) contains essentially the same protection of state laws

governing intrastate water quality and riparian rights. Pub. L. No. 91-575, 84 Stat. 1509, 1536 (1970). Article IV(c) of the Colorado River Compact (among Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming) likewise provides that its provisions addressing water use for navigation and electricity generation "shall not apply to or interfere with the regulation and control by any State within its boundaries of the appropriation, use and distribution of water." 70 Cong. Rec. 324, approved by Pub. L. No. 70-642, § 13, 45 Stat. 1057, 1064 (1928). And the Alabama-Coosa-Tallapoosa Compact (art. X(d), 111 Stat. 2240) and Apalachicola-Chattahoochee-Flint River Compact (art. X(d), 111 Stat. 2226) each provide that "nothing contained in this compact shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective signatory States relating to water quality and riparian rights as among persons exclusively within each state."

These provisions are not limited to consistent state laws—they safeguard state laws whether or not they are deemed consistent with the compact's other provisions. The plain meaning of these different provisions is clear: State laws win out over the compact. The Red River Compact—and the others like it—take just the opposite approach: State laws must be "not inconsistent" with the compact, and if there is a conflict the compact wins. 1JA12 (§ 2.10(a)).

D. When considered in the light of these other compacts, it is apparent that the Red River Compact is not the ode to prevailing state-law power that the court of appeals believed it to be. The Compact, like

many others, allocates water between its signatory States in areas that cross state lines, and requires each State's water laws to be consistent with respect for those allocations. Like many other compacts, Section 2.10(a) simply preserves "the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, *not inconsistent with* its obligations under this Compact." 1JA12 (emphasis added). And Section 2.01 allows each State to make any beneficial use of "the water allocated to it by this Compact" and to "freely administer water rights and uses in accordance with the laws of that state * * * *subject to* the availability of water in accordance with the apportionments made by this Compact." 1JA10 (emphasis added). These provisions are in lockstep—in meaning and, oftentimes, in exact phrasing—with those found in many other compacts (see *supra* pp. 7–11). And until the decisions below, no court has ever interpreted these clauses to authorize a State's *usurpation* of the equitable apportionment of water rights agreed upon by the compact.

State water regulation in Oklahoma, Texas, Arkansas, and Louisiana therefore must be consistent with each State's agreed-upon obligations to the others under the Compact. Those obligations include each State's "equal rights" to the water of the Red River Basin located in Reach II, Subbasin 5. 1JA25 (§ 5.05(b)(1)). The four signatory States are each entitled to no more than 25% of the water in that subbasin (once a certain flow rate at the Arkansas-Louisiana border has been exceeded).

Ibid.[2] According to the compact, any State's failure to use its apportioned, equal right to that water "shall not constitute relinquishment or forfeiture of the right to such use." 1JA11 (§ 2.04).

The conflict between those provisions and Oklahoma's prohibition on any export of water found within its borders is clear enough. Oklahoma's law upends the equitable apportionment that governs beneficial use of the water in Reach II, Subbasin 5, by imposing a significant caveat: Each State has "equal rights" to the subbasin's water—and its corresponding 25% share of certain excess flows—only to the extent it can feasibly locate and capture that water from within its own borders (or, at the very least, outside of Oklahoma).

Upholding Oklahoma's protectionism against preemption by the Red River Compact would perpetuate a regime that could not have been intended by the States. The Compact allocates to the four States "equal rights" to Subbasin 5's water, restricts each of them to no more than 25% of that water (subject to minimum-flow safeguards), and allows each State to retain its equal share even if it does not use it. 1JA25 (§ 5.05(b)). But each State does not have access to exactly a quarter of Subbasin 5's water from within its own borders. Indeed, not a drop of Subbasin's 5's water is located inside

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[2] By contrast, the Red River Compact allocates the water in each of Reach II's other four subbasins to the state in which the subbasin—and its water—are located. *E.g.*, 1JA22 (§ 5.01(b)) ("Oklahoma is apportioned the water of this subbasin and shall have unrestricted use thereof."); see also 1JA23–24 (§§ 5.02–04).

Louisiana. Oklahoma's prohibition on water exports from Subbasin 5 therefore virtually assures that a substantial portion of the Subbasin's water will continue to flow out to sea—unused by States who enjoy "equal rights" to it.

There is no reason to interpret the Red River Compact to permit such a wasteful conflict between its equitable apportionment of water and one of its signatory State's laws. That is particularly true because the compact preserves only those state laws that are "not inconsistent" with the compact.

E. The court of appeals' contrary decision threatens settled expectations under numerous interstate compacts that contain similar provisions. According to one commentator, for example, the decision below may spur future litigation over out-of-state water sales under "[v]irtually identical" provisions in the Sabine River Compact between Texas and Louisiana. See Ryan M. Seidemann, *Water and Power: The Sabine River Authority of Louisiana—A Review of Property Disputes, Hydropower, and Water Sales*, 25 Tul. Envtl. L.J. 389, 405–11 (2012). That compact, like the Red River Compact, preserves "not inconsistent" state laws and permits any beneficial use of allocated water. *Id.* at 409–10; see also Pub. L. No. 83-578, art. II, 68 Stat. 690, 692 (1954). And because the court of appeals placed "great weight" on such commonplace provisions when affirming Oklahoma's protectionism, the commentator opined that a State's new decision "not to sell water out-of-state" under the Sabine River Compact might be "successful." Seidemann, 25 Tul. Envtl. L.J. at 410.

There is every reason to believe that some States would likewise greet affirmance of the decision below as an invitation to engage in similar protectionist behavior. Such a decision would be to the considerable detriment of consumers who rely on access to agreed-upon, equitable apportionments of vital water without regard to borderlines.

II. Oklahoma's Water Protectionism Subverts North Texas's Reasonable Reliance On Water In Oklahoma To Efficiently Meet Its Needs

State and regional water planners have consistently identified the unused water supply just over the Oklahoma border as a reliable, environmentally sound, and economical source to meet petitioner's future demand. Petitioner's access to new water supplies is necessary to satisfy the needs of *amici*'s residents and other area water consumers. If Oklahoma continued effectively to prohibit petitioner from obtaining water in that State—notwithstanding Texas's "equal rights" to water in Reach II, Subbasin 5—then petitioner will be forced to use potentially less reliable and more costly alternatives to obtain the necessary water supply. Meanwhile, Oklahoma's actions will very likely prevent *any* significant beneficial use of that water by *anyone* for the foreseeable future. See *infra* p. 22–23. It will simply continue—as it does now—to empty into the Gulf of Mexico while drought-stricken Texans look on.

A. Texas faces the twin challenges of a population growth and recurring drought. To meet those challenges, Texas will need to identify and connect to numerous sources of additional water supply. Time

is of the essence: New water projects can take decades to come online, but population growth is already booming and continued severe drought appears inevitable.

Texas is already home to approximately 26 million people, and it expects to have 82 percent more residents—nearly 50 million—by the year 2060. Texas Water Development Board, *Water For Texas: 2012 State Water Plan* iii, xii (Jan. 2012), http://tinyurl.com/tarrant16. Texas has divided itself into 16 planning regions for developing water-management strategies. *Id.* at 17. Petitioner and *amici* are located in "Region C"—a 16-county area bordering the Red River and home to 26 percent of Texas's population (primarily in the Dallas-Fort Worth metroplex). *2011 Region C Water Plan* at 1.1–1.2. Region C is "among the fastest growing in the state." *2012 State Water Plan* 44. Its population is expected to almost double over the next 50 years to more than 13 million people. *Id.* at 46–47 & tbl C.1; see also Pet. App. 4a ("The Dallas-Fort Worth metropolitan area has grown rapidly, with a corresponding need for water."). Just in the City of Fort Worth—which is petitioner's largest water customer—a 2010 population of 742,597 is expected to nearly triple to 2,161,533 by 2060. *2011 Region C Water Plan* app. C (tbl. C-129).

This region is already sensitive to the whims of Mother Nature. "[D]roughts have always plagued Texas," according to state planners, and "[i]n serious drought conditions, Texas does not and will not have enough water to meet the needs of its people, its businesses, and its agricultural enterprises." *2012 State Water Plan* iii, xii, 1. During every decade of

the past century, some part of Texas suffered from serious drought conditions. *Id.* at 14. Indeed, when the court of appeals reached its decision below, 99% of Texas "was experiencing severe, extreme, or exceptional drought conditions"—the worst one-year drought in the State's recorded history. *Ibid.* And planners have recognized the considerable risk that "climate variability" could make future droughts worse than any Texas has experienced in the past—leaving no room for error in the State's water-management plans. *Id.* at 5, 151–53. Texas knows that it "cannot change the weather," and so it must prepare for the inevitable shortfall. *Id.* at 9.

B. In recognition of its demographic and climatic challenges, Texas's legislature has identified that "water—more than any other natural resource—challenges the state's future." *2012 State Water Plan* at 1. And so to secure that future, Texas must tap into new sources of water supply. And every new source counts: The State estimates that by 2060 its consumers will demand 22 million acre-feet per year of water. *Id.* at 3. Existing sources are woefully inadequate to meet that demand. In fact, Texas projects that 8.3 million acre-feet per year of that demand for water will have to come from new sources. *Id.* at 4.

Region C's challenges are a microcosm of Texas's. To sustain its increasing population through years of drought, Region C will need to develop new water sources that can provide more than 1.5 million acre-feet per year of water. That amounts to nearly half of the region's total expected water demand by 2060—a breathtaking need for new water that will require "the development of sig-

nificant new water supplies for Region C over the next 50 years." *2011 Region C Water Plan* at ES.6. Tarrant County alone—in which *amici* are located—*already* has a water-supply deficit of nearly 10,000 acre-feet per year. *Id.* at 4A.5 & tbl. 4A.2. And that deficit is projected to rise rapidly—reaching 365,000 acre-feet per year by 2060. *Ibid.* To meet those needs and the needs of its other customers, petitioner must secure an additional 50,000 acre-feet per year by 2020, and 477,000 acre-feet per year by 2060. *Id.* at 4E.14. Indeed, "[m]ost of the water suppliers in Region C will have to develop additional supplies before 2060." *Id.* at 1.83; see also *id.* at 3.28 ("Most water user groups in Region C will need additional water supplies over the next 50 years to meet growing demands.").

A failure to meet the region's increasing water-supply needs would be devastating. Texas projects that if it relied on only its existing water supplies to meet water demand during a drought in 2060, the resulting shortfall would cost the State 1.1 million jobs and 1.4 million residents. *2012 State Water Plan* 6. Businesses that are critical to regional economic security and growth—such as the General Motors assembly plant in the City of Arlington and the Bell Helicopter facility in the City of Fort Worth—are intensely interested in how, and at what cost, the State avoids that catastrophe. For example, manufacturers deciding where to build a new factory—or whether to maintain an existing one—routinely compare projections for the reliability and cost of resources like water. If businesses had reason to doubt that enough reasonably priced, reliable water will be available in the future, everybody loses: "The lost income and tax revenues from failing to

take steps to provide sufficient water for the projected growth in Region C are over $64 billion for a single year." *2011 Region C Water Plan* at ES.7; see also *2012 State Water Plan* 175 ("Unreliable water supplies could have overwhelming negative implications for Texas.").

C. To meet the demand for new water supplies, regional planners have carefully analyzed all feasible sources. Each source is evaluated for its potential environmental effects, reliability, and expense. *2011 Region C Water Plan* at ES.7, 4C.20–4C.26. The range of potentially feasible options includes water conservation, water reuse, connecting to existing water sources, transferring water from other river basins, expanding existing reservoirs or other facilities, and constructing new reservoirs. See *id.* at 4C.3.[3]

Region C's water planners have identified available surface water in the Red River Basin as an attractive source of new water supply. "The Red River Basin is the fourth largest river basin by area within Texas." Texas Water Development Board, *Water For Texas: 2007 State Water Plan* 151 (Jan.

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[3] Water conservation and indirect reuse are key components of the region's water plans. Region C has 40% of Texas's water supplies from conservation and reuse, despite having only 25% of the State's population. *2011 Region C Water Plan* at ES.8. By 2060, the region expects to satisfy 36% of its projected water demand through conservation and reuse. *Ibid.* Petitioner, in partnership with *amici* and its other water customers, continues to invest in these efforts to stretch existing resources. See *id.* at 4B.1–4B.12.

2007). Its waters, as apportioned to Texas by the Red River Compact, are a longstanding and important part of regional plans to meet current and future water-supply needs. *Ibid.*; see also *2012 State Water Plan* 159 (incorporating this portion of the previous plan by reference).

In particular, connecting to existing water supplies located in Oklahoma is an efficient and reliable way to meet a portion of the region's water-supply needs. For more than a decade, water planners have recommended that Region C's water suppliers explore "obtaining water from existing sources in Oklahoma." *2011 Region C Water Plan* at 1.63–1.64; see also *id.* at 4D.13 (citing 2001 and 2006 regional plans). In fact, use of water located in Oklahoma is one of the region's "Recommended Major Water Management Strategies" to prepare for population growth and future drought. *Id.* at 4C.4 & tbl. 4C.1. "In the long run," regional planners have concluded, "Oklahoma remains a promising source of water supply for Region C." *Id.* at 4D.13.

Access to available water in Oklahoma is a longstanding part of these water-management plans because it has many benefits relative to alternative sources. There is a substantial amount of available water in Oklahoma, and it can be accessed from underutilized existing facilities at relatively modest environmental impact and cost to consumers. The efficient allocation of that unused water to consumers who need it is exceedingly important to millions of people.

First, "Oklahoma is blessed with an abundance of water." Oklahoma Water Resources Board, *2012 Oklahoma Comprehensive Water Plan, Executive*

Report 3 (Feb. 2012), http://tinyurl.com/tarrant15. A substantial, reliable, *and unused* portion of that water is located just over the Texas/Oklahoma border. Oklahoma's water-planning "Southeast Region" includes the part of the Kiamichi River from which petitioner proposes to obtain water, and accounts for just 3% of the State's water demand. *Id.* at 67–69. Oklahoma officials estimate that even in 2060, that region will still have *millions of acre-feet per year* of "excess/surplus" water. *Id.* at 77–78, 80. Quite unlike Texas's Region C—Oklahoma's Southeast Region is practically free from any realistic concern that its water supply will be insufficient to meet its future demand. See *id.* at 72–76.

Second, petitioner (and other North Texas water suppliers) can access available water in Oklahoma at "relatively low environmental impacts because of the use of existing sources." *2011 Region C Water Plan* at 4D.14. As a general matter, "[t]he connection of existing supplies that are not yet being fully utilized" has been a "major element" of the region's plans. *Id.* at 4C.5. Alternative strategies, by contrast, may require newly constructed facilities, be located in environmentally sensitive areas, or require ongoing energy expenditure to transport water uphill to its consumers. The construction of new reservoirs, for example, can raise issues about possible "environmental impacts" at the site of inundation and downstream. *Id.* at 4C.13.

Finally, water located in Oklahoma can be retrieved at lower cost than water from other possible projects—costs ultimately borne by consumers and taxpayers. At "about $2.09 per

thousand gallons" (*2011 Region C Water Plan* at 4D.14), water located in Oklahoma can be acquired by Region C suppliers at a lower cost than many other potential projects. See *id.* at 4E.16 & tbl. 4E.4. Many of those other potential projects pose greater upfront capital costs, greater ongoing unit costs to obtain water, or both. See *ibid.* Region C already faces substantial costs to implement its recommended water-management strategies. The necessary capital outlay on projects to meet that region's water demand already totals $21.5 billion—the highest amount in Texas and nearly twice that of the next-highest region. *2012 State Water Plan* 213. The decision below, if affirmed, will force petitioner and other Region C water suppliers to utilize higher-cost and potentially less-reliable strategies, even while a lower-cost and secure water supply sits unused just over Texas's border with Oklahoma.

* * * * *

Much of the western United States faces an imminent water crisis that can be met only with new and reliable sources of water. In many of these States, the water available from interstate river basins has been apportioned between neighboring States by compact, and those compacts provide for rights to certain water without regard to state borders. Such agreements seek "[t]o provide an equitable apportionment," "[t]o promote interstate comity," and to "remove cases of controversy" between the signatory States. 1JA9–10 (§ 1.01(a), (b)). Oklahoma's water protectionism, however, puts unused and easily available water out of Texas's reach. In doing so, it flouts Texas's "equal rights" to water in Reach II, Subbasin 5 of the Red River Basin

and yields the very sort of parochialism and conflict the Compact was designed to avoid.

Texas and other States facing sharply increasing water demand should be encouraged to utilize readily available sources of water—whether they are within or without a State's borders. At the very least, agreed-upon and equitable apportionments of water rights across state lines should be safeguarded from attack. Millions of consumers and tens of thousands of business are depending on it.

CONCLUSION

The decision of the United States Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 11-889

IN THE

Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
Petitioner,

v.

RUDOLF JOHN HERRMANN, *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE CHICKASAW AND CHOCTAW NATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE* CHICKASAW AND CHOCTAW NATIONS [1]

The *amici curiae* Chickasaw and Choctaw Nations are federally recognized Indian tribes, 77 Fed. Reg. 47,869 (Aug. 10, 2012), occupying a homeland set aside for them by the 1830 Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333, [hereinafter "1830 Treaty"].[2] Within their homeland, which is located in present-day southeastern Oklahoma, the concerted activities of these tribal governments are creating jobs, building infrastructure, and enhancing recreational and tourism opportunities. All of this economic activity is dependent on the availability of water. The Nations' interest in this case is in ensuring that water is available in southeastern Oklahoma to meet the future needs of their growing economy and to ensure the health and sustainability of their homeland.

That interest is threatened by the claim that the Petitioner Tarrant Regional Water District makes in this case under the Red River Compact, Act of

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[1] The petitioner and the respondents have both consented to the filing of *amicus curiae* briefs in letters filed with the Clerk. This brief was not authored, in whole or in part, by counsel for any party, and no party or other person other than *Amici* provided any monetary contribution to fund the preparation or submission of this brief.

[2] The 1830 Treaty was made applicable to the Chickasaw Nation by art. 1 of the 1837 Treaty of Doaksville, Jan. 17, 1837, 11 Stat. 573.

Dec. 22, 1980, Pub. L. No. 96-564, 94 Stat. 3305 [hereinafter "Compact"]. Petitioner claims that § 5.05(b)(1) of the Compact authorizes it to enter Oklahoma to harvest excess water in Reach II, Subbasin 5. Brief for Petitioner at 26-30 [hereinafter "Pet. Br."]. To be sure, the threat to the Nations' interests posed by Petitioner's claim is indirect, as the Compact expressly protects all water rights that are based on federal law by providing that: "Nothing in this Compact shall be deemed to impair or affect the powers, rights, or obligations of the United States, or those claiming under its authority, in, over and to water of the Red River Basin." Compact § 2.07. These clear terms protect the Treaty rights in, over and to water that the Nations have asserted in separate pending litigation. *See Chickasaw Nation v. Fallin*, No. 5:11-CV-00927-W (W.D. Okla. filed Aug. 18, 2011); *Okla. Water Resources Bd. v. United States*, No. 5:12-CV-00275-W (W.D. Okla. filed Mar. 12, 2012). In these cases, the Nations are engaged in active negotiations with the State of Oklahoma over state and tribal interests in the proper management of water resources throughout the treaty territory, which resources include waters within a portion of Reach II, Subbasin 5. Petitioner's claim, if upheld, would result in interstate conflict over the management of those resources, which would complicate and make more difficult the Nations' effort in those negotiations to ensure that the future needs of the Nations' homeland will be met.

In sum, the Nations support the Respondents in this case to further the interests they share with the State of Oklahoma in protecting the water resources of southeastern Oklahoma.

SUMMARY OF ARGUMENT

The Chickasaw and Choctaw Nations are managing a growing economy – operating enterprises, creating jobs and building infrastructure – which benefits their homeland, the State, and the region. That economy relies on the water resources of southeastern Oklahoma, and further economic growth will be possible only if those resources are available to meet future needs. Thus, the critical role of water in sustaining such growth is not limited to the area served by the *amici curiae* supporting Petitioner. *See, e.g.*, Brief for the Fort Worth Chamber of Commerce, et al., as Amici Curiae in Support of Petitioner at 2-3 [hereinafter "Fort Worth Br."]. Nor should it be taken for granted that Petitioner's claim will not affect the availability of water in southeastern Oklahoma to meet future needs. The ongoing drought, the impacts of climate change and recent data suggest otherwise. Indeed, even under present conditions, it has not been determined whether there is any excess water available in Reach II, Subbasin 5 for Petitioner to claim, much less the 310,000 acre feet per year that Petitioner seeks.

The Nations agree with Respondents that the Red River Compact does not support Petitioner's claim to water in Oklahoma. The plain language of the Red River Compact does not grant one State the right to enter another State to harvest water. Petitioner argues that a right of entry exists under § 5.05(b)(1) in the absence of a state boundary restriction. That argument fails because it assumes that a right of entry exists under the Compact – which a state boundary reference would be needed to negate – when that is the very question to be decided in this case. Furthermore, the absence of a state boundary

reference in a Compact provision that allocates water cannot establish a right of entry because these are separate rights, the former relating to a quantity of water and the latter to access to land. Finally, the "equal rights to the use of" excess water that § 5.05(b)(1) provides – which do not guarantee any State any amount of water – are not offended if a right of entry is not provided to any State by the Compact.

If the Compact is considered ambiguous on that question, however, the Petitioner's prior course of dealings under the Compact – under which it claims full authority to assert rights, 1 Joint Appendix 177 – would be highly significant. Those prior dealings show that Petitioner, as member of the North Texas Water Alliance, earlier sought to negotiate a water sale contract with the Nations and the State. In those negotiations, Petitioner did not claim that it already had the right to enter Oklahoma to harvest water and construct facilities to export that water to Texas, as it does now. Instead, Petitioner sought to buy water from Oklahoma and the Nations, which was to be transported to Texas through facilities constructed and owned by the Nations and Oklahoma. If Petitioner had the rights it now claims under the Red River Compact, it would have asserted those rights in the prior negotiations.

Finally, in the event the Court vacates the judgment below and remands this case for further proceedings consistent with the Court's opinion, we agree with the United States that further proceedings would be needed in the district court to resolve questions of fact, Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at 27 [hereinafter "U.S. Br."], including whether there is

any excess water in Subbasin 5, and if so, whether Texas is already receiving it full share of that water. We also agree that any proceedings on remand would not require, and should not include, issues concerning the Nations' water rights, *id.* at 31, which are protected from any effect of the Red River Compact by its express terms, *id.* § 2.07, and are the subject of separate and ongoing litigation.

ARGUMENT

I. THE GROWTH OF THE NATIONS' ECONOMY DEPENDS ON THE AVAILABILITY OF WATER RESOURCES TO MEET FUTURE NEEDS.

A. The Nations Are Managing A Growing Economy That Benefits The Nations, The State And The Region As A Whole.

The Chickasaw and Choctaw Nations are funding the basic blocks used to build a self-sufficient, growing economy: Jobs, roads, healthcare and education. In so doing, they are pursuing the economic development and self-sufficiency goals of the federal Indian policy of tribal self-determination.[3]

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[3] That policy was announced by President Nixon in 1970. Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS 564-66 (July 8, 1970). As this Court has recognized, "the goal of promoting tribal self-government," includes "Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)).

When the Chickasaw Nation purchased a motor inn in Sulphur, Oklahoma in 1974,[4] it initiated a period of unprecedented tribal economic development. The Nation's enterprises now include banking, gaming, professional services and other enterprises, which together generate over $1.3 billion in annual revenue. Steven C. Agee Econ. Research & Policy Inst., Okla. City Univ., *Estimating the Oklahoma Economic Impact of the Chickasaw Nation* 4 (2012), *available at* http://tinyurl.com/AgeeChick [hereinafter "Agee"]. From 1987 to 2006, the Chickasaw Nation's budget grew from $11 million to $350 million dollars. Scott Wigton, *Chickasaw Nation: Getting it Right*, OKLA. TODAY, May-June 2006, at 40, 45, *available at* http://tinyurl.com/Ok2Day06. The tribal government spends over a quarter billion dollars each year in payroll and other government expenditures. Agee at 4. The Nation also brings federal funds into the treaty territory: in 2011 the Nation brought over $7 million in federal road funding into Oklahoma. *Id.* at 8.

These revenues pump over $1.5 billion dollars into the regional economy. *Id.* at 6. Multiplier effects bring the overall economic impact of the Chickasaw Nation in Oklahoma to $2.4 billion a year. *Id.* And this activity supports nearly 16,000 jobs in Oklahoma. *Id.*

The Chickasaw Nation also contributes to the quality of life in southeastern Oklahoma in other ways. The Chickasaw Division of Health maintains a 72-bed hospital and hosts nearly 430,000 outpatient

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[4] Vera Holding & Marijo Gibson, *Indians in Industry*, OKLA. TODAY, Spring 1974, at 15, 15-16, *available at* http://tinyurl.com/Ok2Day74.

visits a year. INDIAN HEALTH SERV., U.S. DEP'T OF HEALTH & HUMAN SERVS., IHS Pharmacy Residency Program, http://tinyurl.com/IHSChick (last visited Mar. 24, 2013). Its educational services range from Head Start programs serving over 260 children, Tribal Educ. Dep'ts Nat'l Assembly, Tribal Education Departments Report 18 (2011), *available at* http://tinyurl.com/TribalEd, to a higher education scholarship program that helps fund between 1,900 and 2,300 college students' education every academic year. *Id.* at 20.

In addition, the Nation has developed a long-term partnership with the Nature Conservancy of Oklahoma ("TNCO") to protect water sources in its homeland. Rhett Morgan, *Nature Conservancy Buys New Preserve Along Blue River*, TULSA WORLD, Dec. 7, 2011, *available at* http://tinyurl.com/TNCOChick. Through that partnership, TNCO and the Nation seek to protect the water quality of the Blue River, and thus its availability as a source of drinking water and recreational opportunities, and to preserve its aesthetic beauty. *Nature Conservancy, Chickasaw Nation Join Forces*, ADANEWS, Dec. 18, 2006, *available at* http://tinyurl.com/TNCOChick2. One result of this partnership is *Oka' Yanahli*, or "water flowing," a 490-acre preserve along the Blue River in the treaty territory. By protecting the Blue River, it helps maintain the quality of the River's water as it flows past Durant, Oklahoma and into the Red River. The Nature Conservancy, *Nature Conservancy Unveils Name of New Preserve Along Blue River*, Mar. 31, 2012, http://tinyurl.com/TNCOChick3 (last visited Mar. 24, 2013); Morgan. This maintains its quality as a source of drinking water, recreation and natural beauty.

The Chickasaw Nation has also helped increase tourism in the region, much of which is driven by water-based recreational activities. The Chickasaw Cultural Center has attracted over 150,000 visitors since 2010. Ken Raymond, *South Central Oklahoma Undergoing Renovations*, NEWSOK, Sept. 23, 2012, http://tinyurl.com/SEOkla. And the Nation is building a new hotel on the site of the historic Artesian Hotel in Sulphur which, in conjunction with a new Chickasaw Nation Visitors Center, will serve as the gateway for visitors to the nearby Chickasaw National Recreation Area, a unit of the National Park Service. *Id.* The Nation has also partnered with the Arbuckle Country Marketing Association to market these resources to tourists and visitors, bringing more tourism money into the region. *Id.*

The Choctaw Nation has also made a large contribution to the growth of the economy of their homeland, and to the State and regional economies. The Nation maintains a workforce of more than 6,000, and has an annual payroll approaching $300 million. Mark Fogarty, *The Growing Economic Might of Indian Country*, INDIAN COUNTRY TODAY MEDIA NETWORK, Mar. 15, 2013, http://tinyurl.com/Choc Econ (last visited Mar. 25, 2013). The Nation also invests in services, such as healthcare and education, that improve the economy of southeast Oklahoma while also improving the quality of life of its people. In 1999, the Choctaw Nation became the first tribe to build its own hospital with its own funding. CHOCTAW NATION HEALTH SERVS. AUTH., CHOCTAW NATION HEALTH CARE CENTER, *available at* http://tinyurl.com/ChocHealthCtr (last visited Mar. 26, 2013). With an annual budget of over $100 million, the Choctaw Nation Health Services provide healthcare to inpatients and manage more than

540,000 outpatient visits annually. CHOCTAW NATION HEALTH SERVS. AUTH., *Excellence in Rural Healthcare* (2011) 4, *available at* http://tinyurl.com/ChocHealth Serv (last visited Mar. 24, 2013). The Nation also provides education services: they begin with managing thirteen Head Start facilities for nearly 340 children annually, CHOCTAW NATION HEAD START, ANNUAL REPORT 2010-11 5, *available at* http://tinyurl.com/ChocHeadSt, and continue all the way to funding the Scholarship Advisement Program, which prepares students to graduate high school and enter college, CHOCTAW NATION SCHOLARSHIP ADVISEMENT PROGRAM (2012) http://tinyurl.com/ ChocSAP (last visited Mar. 24, 2013), and providing a free GED preparation program for adults. CHOCTAW NATION, EDUCATION, *available at* http://tinyurl. com/ChocGED (last visited Mar. 24, 2013).

When the Chickasaw and Choctaw Nations invest in these aspects of the regional economy, they attract people and businesses that rely on the region's infrastructure to maintain a good quality of life for themselves and their employees. And, indeed, southeastern Oklahoma is attracting new residents: According to the U.S. Census, four of the top ten fastest growing counties in Oklahoma are located in the treaty territory. Index Mundi, Oklahoma Population Growth Rate by County (2010) http://tinyurl.com/ CountyGrowth (last visited Mar. 24, 2013). Furthermore, by developing a tourist economy in partnership with regional boosters, the Nations help bring in a stream of revenue to local businesses that would otherwise be smaller or non-existent. In sum, by investing in southeast Oklahoma, the Nations are fueling an economic engine that produces benefits for

the entire state and region.[5] Thus, the interests that Dallas and Fort Worth assert in continuing their economic growth, Fort Worth Br. at 2; Brief of City of Dallas as Amicus Curiae in Support of Petitioner at 16-17 [hereinafter "Dallas Br."], do not stand alone.

B. The Continued Economic And Environmental Health Of The Nations' Homeland Depends On The Sound Management And Future Availability Of Water Resources.

The Nations, businesses, and communities of the treaty territory all depend on the availability of an adequate supply of water. As the Nations continue to grow their own enterprises, and attract new employers and employees to the area, the demand for

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[5] Although the Nations have invested in southeast Oklahoma's economy to the benefit of the State and the region, there is still more room – and need – for growth. In 2011, thirteen of the 22 counties in the treaty territory had poverty rates of 17.9% or higher, and five more had poverty rates between 15.9% and 17.8%, compared to an overall Oklahoma rate of 17.3% and a national rate of 15.9%. ECON. RESEARCH SERV., U.S. DEP'T OF AGRICULTURE, County-level Data Sets 2011, *available at* http://tinyurl.com/SEOklaPoverty (last visited Mar. 24, 2013) (for national poverty rate, click "Overview," then "Poverty," then scroll down to list to "National"). Five of the ten most impoverished counties in Oklahoma are in the treaty territory, including the most impoverished county, McCurtain, which has an overall poverty rate of 30.9% and a childhood poverty rate of 40.3%. *Id.* And McCurtain County began 2013 with an unemployment rate of 9.8%, tied for highest in the State. OKLA. EMPLOYMENT SECURITY COMM'N MEDIA, *Latimer, McCurtain Counties Share Highest County Unemployment Rate to Open 2013*, OKLAHOMA WELCOME, Mar. 22, 2013, http://tinyurl.com/HighUnemploy.

water will grow. As a result, the Nations' ability to rely on the waters of the treaty territory will only become more important over time. Thus, like the cities of Dallas and Fort Worth, *see* Fort Worth Br. at 7-12; Dallas Br. at 15-17, the Nations have a substantial interest in the availability of water to meet their future needs.

Petitioner relies on the 2012 Oklahoma Comprehensive Water Plan to assert that water is abundant in southeastern Oklahoma. *See* Pet. Br. at 14. But that document does not purport to address the Nations' needs for water.[6] Furthermore, while Petitioner apparently considers any water left in the streambed to be "unused," Pet. Br. at 14, this overlooks the importance of instream flows to the ecology and upland and aquatic resources of south-

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[6] Oklahoma has yet to implement any policy for state-tribal water resource planning and management. The State's 1975 and 1980 water plans both denied the existence of tribal water rights within Oklahoma. OKLA. WATER RES. BD., OKLAHOMA COMPREHENSIVE WATER PLAN 7-8 (1975), *available at* http://tinyurl.com/1975Plan; OKLA. WATER RES. BD., OKLAHOMA COMPREHENSIVE WATER PLAN 11 (1980), *available at* http://tinyurl.com/1980Plan. And while the State's 1995 plan recognized the significance of tribal water right claims and called for proactive intergovernmental engagement to seek a resolution of those claims, OKLA. WATER RES. BD., UPDATE OF THE OKLAHOMA COMPREHENSIVE WATER PLAN 1995 119, 138 (1995), *available at* http://tinyurl.com/1995Plan, the State had not followed through on this plan by 2012, when it returned to its water plan. The 2012 plan reaffirms the State's recognition of the significance of tribal water rights – stating that federal law rules "tend to favor the tribal position" – and renews the call for proactive intergovernmental engagement. OKLA. WATER RESOURCES BD., 2012 OKLAHOMA COMPREHENSIVE WATER PLAN EXECUTIVE REPORT 13, 35-36 (2012), *available at* http://tinyurl.com/2012PlanUpdate. Nevertheless, the Oklahoma Comprehensive Water Plan makes no attempt to address or accommodate tribal water needs.

eastern Oklahoma. The Kiamichi River is of special concern because it is part of the habitat of the Ouachita Rock Pocketbook, which is an endangered species. U.S. FISH & WILDLIFE SERV., DEP'T OF INTERIOR, OUACHITA ROCK POCKETBOOK 1 (2011), *available at* http://tinyurl.com/OuachitaPB. And among the natural resources that depend on instream flows, river cane is especially important to the Nations, particularly for basketry. John R. Swanton, Source Material for the Social and Ceremonial Life of the Choctaw Indians 40-41 (Univ. of Ala. Press 2001) (1931).[7] In sum, whether there is an abundance of water in southeastern Oklahoma depends on what needs and uses are recognized in making that determination.

There are also unanswered questions about the amount of excess water in Reach II, Subbasin 5, and when it is available. The Red River Compact's interpretive comments, prepared in 1979, reported that the flow of the Red River at the Arkansas-Louisiana boundary was less than 3,000 cubic feet per second ("cfs") only 4.2% of the time, 1 J.A. 30, RED RIVER COMPACT COMM'N, RED RIVER COMPACT

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[7] Rivercane grows in dense stands called canebreaks. NATURAL RES. CONSERVATION SERV., U.S. DEP'T OF AGRICULTURE, PLANT GUIDE: GIANT CANE 1 (2012), *available at* http://tinyurl.com/GiantCane. Although continual saturation can harm cane, canebreaks rely on regular sources of water to grow. *Id.* at 5-6. Canebreaks also require periodic disturbances to maintain healthy growth. *Id.* at 5. Such disturbances include fires or flooding. *Id.* In the absence of regular, controlled fires, natural periodic floods provide good conditions for cane growth. *Id.* Instream flows provide sufficient water for cane to grow, and allow for the periodic flooding of riparian habitats that are necessary to maintain the healthy canebreaks that support the Nations' cultural uses.

WITH SUPPLEMENTARY INTERPRETATIVE COMMENTS OF LEGAL ADVISORY COMMITTEE (1979) [hereinafter "Interpretive Comments"]. But conditions have changed since 1979. This is shown by U.S. GEOLOGICAL SURVEY, DEP'T OF INTERIOR, WATER-DATA REPORT 2012 07344370 RED RIVER AT SPRING BANK, AR (2013), *available at* http://tinyurl.com/2012Gage. The Spring Bank gage is approximately 4.5 miles north of the Arkansas-Louisiana border,[8] and it shows monthly mean values of less than 3,000 cfs in five of the twelve months of the 2012 Water Year.[9] *Id.* at 2. And for the period from 1998-2012, the daily mean fell below 3,000 cfs at least once in eight of twelve months. *Id.* And locally, Hugo Lake, just upstream from Tarrant's proposed diversion, tied its all-time low water mark on October 12, 2012. *Hugo Lake: How Low Can It Go?*, NEWSOK, Feb. 13, 2013, http://tinyurl.com/HugoLow (last visited Mar. 24, 2013).

The ongoing drought also creates uncertainty about the water that will be available in southeastern Oklahoma in the future. In 2010-11, Oklahoma experienced a major drought, similar to the serious droughts of the 1930s, 1950s, 2001-02 and 2005-06. Yang Hong, *Climate Change and Hydrological Extremes* (Undated), http://tinyurl.com/YangHong (last visited Mar. 24, 2013) [hereinafter "Hong"]. From

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[8] There are no significant tributaries between the Spring Bank gage and the Arkansas-Louisiana border, and thus a significant difference in streamflow between the two points is unlikely.

[9] The water year begins on October 1 and ends on September 30 of the next year; it is identified by the year it begins. *See* U.S. GEOLOGICAL SURVEY, SCIENCE IN YOUR WATERSHED (W.B. LONGBEIN & KATHLEEN T. ISERI, 1995 edit.) (1960), *available at* http://tinyurl.com/wateryr.

mid-July to November 2010, more than half of the state was in "Exceptional Drought," with all parts of the state experiencing some degree of water shortage. Nat'l Drought Mitigation Ctr., Drought Monitor Statistics, http://tinyurl.com/Drought2010 (last visited Mar. 24, 2013). Preliminary estimates conservatively placed the losses to Oklahoma's agriculture incurred by the drought at $1.6 billion. Okla. Water Res. Ctr., *Oklahoma Agricultural Losses from Drought More Than $1.6 Billion*, Okla. State Univ., Sept. 9, 2011, http://tinyurl.com/DroughtLosses (last visited Mar. 24, 2013). The drought continues; on January 9 of this year, the United States Department of Agriculture declared seventy-six of Oklahoma's seventy-seven counties to be federal natural disaster areas due to ongoing drought. U.S. DEP'T OF AGRICULTURE, *USDA Designates 597 Counties in 2013 as Disaster Areas Due to Drought*, Jan. 9, 2013, http://tinyurl.com/EmergencyDrought (last visited Mar. 24, 2013).[10]

These data and reports give weight to the Nations' concerns about the availability of water to meet future needs in their homeland; if it is not adequate, the value of the investment in the economy of southeast Oklahoma that the Nations and others have made to date would be undermined. And it

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[10] And such droughts are likely to recur in the future, in southeastern Oklahoma and across the state, as average annual temperatures in the state are expected to rise by between 2.3 and 4.5 degrees Celsius by 2100, while anomalously low rainfalls are anticipated in southeastern Oklahoma throughout the next century. Hong. Climate change models predict that Oklahoma's average rainfall will decrease relative to the rest of the world's by 2090. Kenneth D. Fredrick & Peter H. Gleick, WATER & GLOBAL CLIMATE CHANGE 6 (1999), *available at* http://tinyurl.com/lowerrain. In short, the drought in southeast Oklahoma is likely here to stay.

would be more difficult to attract new businesses and residents to southeastern Oklahoma. In sum, if the future availability of water in southeastern Oklahoma is insecure, southeastern Oklahoma will suffer the consequences just as it is beginning to attract new businesses.

II. THE COMPACT DOES NOT GRANT PETITIONER THE RIGHT TO ENTER OKLAHOMA TO OBTAIN WATER.

A. The Plain Language Of § 5.05(b)(1) Rejects Petitioner's Claim.

The plain language of section 5.05(b)(1) of the Compact secures to each Signatory State "equal rights to the use of" the runoff and undesignated water in Subbasin 5 when the flow of the Red River at the Arkansas-Louisiana border exceeds 3,000 cfs, provided that "no state is entitled to more than 25% of the water in excess of 3,000 [cfs]." *Id.* Petitioner asserts that this also means that a State may take its share of excess water "*regardless of where in the subbasin the water is located or where it originated*," Pet. Br. at 27. But the words supplied by Petitioner, though essential to make its case, would be unnecessary if § 5.05(b)(1) actually contained such language. It does not.

Seeking to fill this gap, Petitioner asserts that the absence of a state boundary reference in § 5.05(b)(1) means that one State may enter another to harvest excess water. Pet. Br. at 27-29. The United States advances essentially the same argument. U.S. Br. at 17-19. But the use of a state boundary reference could not negate a right of entry, nor would it be necessary to do so, unless that right was first shown to exist under the Compact. Rather than address

this question, Petitioner assumes that under the Compact, each State has the right to enter another State to harvest water unless that right is negated. *See* Pet. Br. at 27.[11] As just shown, however, the plain language of the Compact does not support that assumption.

Petitioner does point to instances in which the Compact uses the boundaries of a State to describe the limits of a Reach or Subbasin, or to allocate water within a subbasin. Pet. Br. at 28. But Petitioner does not explain why the use of state boundaries for those purposes means that one State may enter another to harvest water whenever such boundaries are not referenced. The flaw in this argument is that it treats an allocation of water to a State as also granting a State the right to take that water anywhere it wishes. Because those rights are distinctly different – one is a right to use water, and the other a right to enter land to obtain water – the right of entry cannot be implied from an allocation of water.

B. The Right Of Entry That Petitioner Claims Cannot Be Implied From § 5.05(b)(1).

Petitioner relies on the phrase "equal rights to the use of [excess water]" that appears in § 5.05(b)(1) in

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[11] Petitioner goes so far as to claim that under § 2.05(c) of the Compact – which contains no state boundary reference – any State has the right to build a storage facility in another State, as long as doing so would not interfere with the delivery of water apportioned to the other State. *See* Pet. Br. at 29. If Petitioner were correct, however, the construction of a storage facility by one State in another could never interfere with the other State's apportionment of water, since the other State would be free to take its apportionment in any of the other three States.

an effort to imply a right of entry under that provision. But this argument places more weight on that phrase than it will support. The rights of the States are equal because each State has the same right to use excess water, without regard to the contribution it makes to the total quantity of excess water available under § 5.05(b)(1). Thus, Louisiana – which has no land in Subbasin 5, and therefore contributes nothing to its excess waters – has the same right as the other States. Furthermore, no State is guaranteed any minimum quantity of water by § 5.05(b)(1) – instead, it caps each State's right to use excess water at 25% of the flow above 3,000 cfs. Accordingly, the term "equal rights" cannot be read to guarantee a State any quantity of excess water in Subbasin 5, much less to imply a right of entry to harvest that water. And since no State has such a right, its unavailability does not offend the equality of their rights.

Petitioner also contends that each State must have the right of entry in order to harvest its share of excess water because otherwise Louisiana, which has no land in Subbasin 5, would have no right to water under § 5.05(b)(1). Pet. Br. at 31. That argument is rejected by the terms of the Compact. Whether there is any excess water in Subbasin 5 depends on the flow at the Arkansas-Louisiana border, § 5.05(b)(1). If there is excess water, Louisiana's share is delivered to it at the Arkansas-Louisiana border, at the same time its right to that water comes into being. Furthermore, Louisiana's right to use the bed and banks of the Red River to transport runoff and undesignated water from other States is provided by

§ 2.05(d) of the Compact, which secures the same right to each Signatory State.[12]

Finally, Petitioner supports its claimed right to enter Oklahoma to harvest excess water by asserting that the water in the mainstem of the Red River is too saline to use as drinking water. Pet. Br. at 6. That assertion is, however, irrelevant to the scope of Petitioner's rights under the Compact. The Signatory States were aware of the natural salinity of the Red River water when the Compact was negotiated, as the Interpretive Comments show. 1 J.A. 48. But the Compact does not enlarge or decrease any State's apportionment of water in relation to its quality. To the contrary, while § 2.10(b) of the Compact recognizes each State's right to "lessen or prevent the pollution or natural deterioration of water within its jurisdiction," it expressly states that such recognition "shall not alter any provision of this Compact dealing with the apportionment of water or the rights thereto. . . ." *Id.*[13]

In sum, Petitioner's claim fails because § 5.05(b)(1) does not grant one State the right to enter another State to harvest excess water, much less the right to construct facilities in another State to transport that water back to the harvesting State.

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[12] Section 2.05(d) provides that each Signatory State "shall have the right to" "[u]se the bed and banks of the Red River and its tributaries to convey stored water, imported or exported water, and water apportioned according to this compact." *Id.*

[13] And even if Petitioner's contention that the salinity of the Red River makes it unusable as drinking water were relevant, it may not be correct, as the United States has shown that Texas is treating and using water from Lake Texoma as drinking water, and Lake Texoma (which impounds the Red River) is immediately upstream from Subbasin 5. U.S. Br. at 26.

III. PETITIONER'S PRIOR COURSE OF PERFORMANCE CONCERNING THE RED RIVER COMPACT REJECTS ITS PRESENT CLAIM.

A. Petitioner's Prior Effort To Buy Water From Oklahoma And The Nations Cannot Be Squared With Its Present Position.

In determining the meaning of a compact provision that is ambiguous, "the parties' course of performance under the Compact is highly significant." *Alabama v. North Carolina*, __ U.S. __, 130 S.Ct. 2295, 2309 (2010). Petitioner is a Texas state agency, *Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d 1222, 1227 (10th Cir. 2011),[14] with full authority to assert Texas' rights under the Red River Compact. "The State of Texas and Texas Attorney General, construing Texas law, have expressly recognized [Petitioner's] authority to seek to acquire for the benefit of Texas citizens water apportioned by the Red River Compact to Texas." 1 J.A. 177, Supplement to Amended Complaint at ¶ 28.1. Thus, Petitioner's course of performance under the Compact is highly significant in determining whether its current interpretation of the Compact is correct.

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[14] Petitioner is a political subdivision of the state that serves only governmental functions. *Tarrant Reg'l Water Dist. v. Gragg*, 43 S.W.3d 609, 614 (Tex. App. 2001).

In late 2000, Petitioner and several other Texas water districts and municipalities formed the North Texas Water Alliance ("NTWA").[15] 2 J.A. 344-45, OKLA. WATER RES. BD., JOINT STATE/TRIBAL WATER COMPACT & WATER MARKETING PROPOSALS 8 (2002) [hereinafter "Status Report"]. They then sought to negotiate a contract with the State of Oklahoma and the Chickasaw and Choctaw Nations to purchase water in southeastern Oklahoma. 2 J.A. 344-45, Status Report 7-8. The NTWA initiated that effort by responding to the Nations' and the State's Request for Proposals ("State/Tribal RFP") for the use and development of surface waters in southeastern Oklahoma. 2 J.A. 344, Status Report 7.[16]

The NTWA proposed "the taking of approximately 120,000 to 160,000 acre-feet/year of water from the Kiamichi River below Hugo dam," and "up to an additional 200,000 acre-feet/year from the Little and Mountain Fork River Basins." 2 J.A. 347, Status Report 10. Petitioner now seeks to divert water from

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[15] The *amici* North Texas Municipal Water District and Upper Trinity Water District, were also members of the NTWA. 2 J.A. 345, Status Report 8.

[16] The State/Tribal RFP required that any proposal be "consistent with the cornerstone principles and criteria contained within the Kiamichi Basin Water Resources Development Plan." *Id.* The first cornerstone principle requires that "present and future water needs in the [Kiamichi] basin area are protected," and is implemented by the first evaluation criteria, which inquires whether "the proposal [is] consistent with the cornerstone principle that grants Oklahomans the highest priority related to present and future water needs?" 2 J.A. 342, Status Report 5.

the Kiamichi River at the same location – below Hugo dam. Pet. Br. at 15.[17] But there is one major difference between its present claim and its prior position. The NTWA, including Petitioner, earlier sought to buy water from the State and the Nations, which would be delivered in Texas by the State and the Nations. 2 J.A. 365, 372, Status Report 28, 35. By contrast, Petitioner now claims that it already has the right to enter Oklahoma to obtain water and construct facilities to export that water to Texas. Pet. Br. at 26-30. And it seeks to take 310,000 acre-feet/year from the Kiamichi River below Hugo dam, *Id.* at 15, which is twice the amount earlier sought from that location.

B. Petitioner's Conduct In Negotiations To Buy Water From The Nations And Oklahoma Also Rejects Its Present Claim.

Petitioner's conduct in the contract negotiations that were subsequently entered into by the NTWA with the Nations and the State is also wholly inconsistent with its present claim. That contract would have been between the NTWA and the State-Tribal Intergovernmental Compact Commission ("STICC"), which consisted of the Nations and the State. 2 J.A. 363, Status Report 26.[18] Those negoti-

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[17] The diversion point for both proposals is within Reach II, Subbasin 5, which includes the Red River from Denison Dam to the Arkansas-Louisiana border and all tributaries not included in other subbasins of Reach II. Compact § 5.05(a).

[18] The STICC was to be created under the terms of a Tribal-State compact that would have governed the authorization of out-of-state water use agreements. 2 J.A. 353-56, Status Report 16-19.

ations, and the terms of the draft contract, are also discussed in the Status Report.

The NTWA proposed to phase in water exports to Texas by incrementally increasing the amount exported, 2 J.A. 365, Status Report 28. In the initial phase, water would be diverted from the Kiamichi River downstream from Hugo Lake, transported in a pipeline across the Red River "to the point of delivery, where the NTWA would be responsible for all pipelines, pumps, easements and other costs for infrastructure within the State of Texas to distribute water to NTWA members." *Id.* (emphasis added). In other words, Oklahoma and the Nations would jointly manage water on one side of the state line, while Texas would manage water on the other side. "The NTWA proposal . . . clarifies that no Texas entity will own property in Oklahoma. The HCR 1066 Working Group and Oklahoma negotiating team concur that ownership of infrastructure by a Texas water sale entity could threaten Oklahoma's control of water going to Texas. The draft contract specifies that the STICC . . . would own all property and infrastructure, including all pipelines, easements, pumps and pumping stations, and all water rights associated with the water sale. The NTWA would have only a contractual right to have water delivered at the point of delivery within the State of Texas, just south of the Red River." 2 J.A. 372, Status Report 35 (emphasis added).

The Status Report also reviews the negotiations over the price of water. The parties agreed that "the least cost-alternative approach to pricing the water would be appropriate." 2 J.A. 373, Status Report 36. NTWA's position was that the least cost alternative would be to construct the Marvin Nichols Reservoir

"on the Sulfur River, in east Texas south of Idabel, Oklahoma," which had an estimated cost of "approximately $1.7 billion (amortized over 30-40 years through bonds that would be used for payment of construction costs)." *Id.* But while the Red River Compact is referenced in the Status Report, no mention is made of the alternative Petitioner now claims – that under the Red River Compact it already has the right to enter Oklahoma to obtain water for free, forever, and the right to construct facilities of its own, in Oklahoma, to transport that water to Texas.

In sum, the negotiations between the STICC, including the State and the Nations, and the NTWA, including Petitioner, show that Petitioner did not believe that under the Red River Compact it had the right to enter Oklahoma to obtain water, much less to construct facilities there to transport that water to Texas.

IV. IF THE JUDGMENT OF THE COURT BELOW IS NOT AFFIRMED, FURTHER PROCEEDING WOULD BE NEEDED ON REMAND TO RESOLVE PETITIONER'S CLAIM.

In the event the Court vacates the judgment below and remands this case for further proceedings consistent with the Court's decision, we agree with the United States that further proceedings would be needed in the district court to resolve questions of fact. U.S. Br. at 27. We also agree that any such proceedings would not require, and should not include, issues concerning the Nations' water rights, *id.* at 31, which are protected from any effect of the Red River Compact by its very terms. Compact § 2.07.

A. Factual Questions Would Have To Be Resolved On Remand To Determine Whether Tarrant Has Any Right To Water In Oklahoma Under § 5.05(b)(1).

In the event of a remand, there are several factual questions that would have to be resolved in order to determine whether Petitioner has a right to excess water in Oklahoma under § 5.05(b)(1) of the Compact.

First, there are outstanding questions about the amount of excess water available in Subbasin 5, and when it is available. *See supra* at 12-14.

Second, it remains to be determined whether Texas is already receiving 25% of the runoff and undesignated water in Subbasin 5. If so, Petitioner could not rely on § 5.05(b)(1) of the Compact to claim more water, since "no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second." *Id.* Petitioner earlier dismissed the relevance of this question, stating that "Tarrant has neither alleged nor presented evidence regarding Texas' current use or receipt of water under the Compact, since that is not an element of Tarrant's claim for relief or its Article III standing, ..." Tarrant's Response to Court's June 15, 2011 Order for Supplemental Briefing at 1, *Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d 1222 (10th Cir. 2011) (No. 10-6184). Petitioner added that, if the question were material, it could show that Texas was not receiving its share of water, but then asserted that its share of water is "unlimited" when the measured flow exceeds 3,000 cfs and there are no competing uses, before finally stating that Texas was not receiving an equal share in any event. *Id.* at 1 n.1. But Petitioner

did not say how much water Texas was already receiving.

Furthermore, there are reasons to think that Texas is already receiving its full share. Texas has a larger portion of the drainage area in Reach II, Subbasin 5 within its borders than does Oklahoma. 2 J.A. 316, REPORT OF THE ENGINEERING ADVISORY COMMITTEE TO THE RED RIVER COMPACT COMMISSION, at Figure 3 (1978) (identifying the drainage area for Texas as 1485 square miles, and for Oklahoma, 858 square miles). And the precipitation rates for northeastern Texas and southeastern Oklahoma are comparable. *Cf.* U.S. GEOLOGICAL SURVEY, DEP'T OF INTERIOR, THE NATIONAL ATLAS OF THE UNITED STATES OF AMERICA, TEXAS PRECIPITATION (2005), *available at* http://www.nationalatlas.gov/printable/images/pdf/precip/pageprecip_tx3.pdf (illustrating average annual Texas precipitation 1961-1990) *with* U.S. GEOLOGICAL SURVEY, DEP'T OF INTERIOR, THE NATIONAL ATLAS OF THE UNITED STATES OF AMERICA, OKLAHOMA PRECIPITATION (2005), *available at* http://www.nationalatlas.gov/printable/images/pdf/precip/pageprecip_ok3.pdf (illustrating average annual Oklahoma precipitation 1961-1990). Thus, the assertion that Texas has less water available to it in Subbasin 5 than Oklahoma is speculative. And while Petitioner makes that very claim, Pet. Br. at 9 n.5, the 1970 report on which it relies (which Petitioner has lodged with the Clerk) makes no reference to Subbasin 5.

Nor has Petitioner said anything about how much undesignated water, *see* Compact § 3.01(*l*) (defining undesignated water), already flows into Subbasin 5 in Texas from the fourteen existing, authorized or

proposed last downstream major damsites in Texas that demark the Texas portion of Subbasin 5. Compact §§ 5.02(a) (listing eleven), 5.04(a) (listing three). All of that water would become excess water when it flows into Subbasin 5, provided that the flow at the Arkansas-Louisiana border exceeds 3,000 cfs § 5.05(b)(1).

Third, even if Texas were not receiving its full share, it would be necessary to determine how much excess water it was receiving in Subbasin 5 within its borders, since Petitioner could not claim more than the difference between that amount and Texas' 25% share, as § 5.05(b)(1) makes clear. And as the United States points out, that information is also needed to avoid intruding on the other States' share of excess water. *See* U.S. Br. at 24.

B. If Remanded, This Case Would Not Require The Resolution Of Any Question Concerning The Nations' Water Rights.

We agree with the United States that any remand in this case should not include any issues concerning the Nations' water rights. U.S. Br. at 31 & n.11. The Red River Compact expressly disclaims any effect on rights held by the United States or those claiming under its authority: "Nothing in this Compact shall be deemed to impair or affect the powers, rights, or obligations of the United States, or those claiming under its authority, in, over and to water of the Red River Basin." Compact § 2.07. The Nations' treaty rights to the waters of the Red River Basin are both obligations of the United States and are claimed by

the Nations under the authority of the United States, and as such are protected by § 2.07.[19]

This conclusion is confirmed by the Interpretive Comments and the legislative history of the Compact. The Interpretive Comments state expressly that § 2.07 "insures that federal rights and obligations are unaffected by the Compact." 1 J.A. 14 (emphasis added). That conclusion is underscored by statements made at the Congressional Subcommittee hearing on whether to approve the Compact. The Assistant Director of Civil Works of the Army Corps of Engineers stressed in his statement "that the [Red River] Compact is an agreement among the States and not binding upon the U.S. Government. . . . [T]he United States' participation should not be viewed as binding on the rights, duties or obligations of the Federal government." *Red River Compact and Caddo Lake Compact: Hearing Before the Subcomm. on Admin. Law & Gov'tl Relations of the H. Comm. on the Judiciary*, 96th Cong. 2d. Sess., 4 (1980) (statement of Col. Alan Laubscher). The parties intended that the United States' interests would not be affected by the Compact. *Id.* at 4 (citing Compact § 2.07). "Section 2.07 effectively precludes any interference in the powers, rights, or obligations of the United States." *Id.* Furthermore, the United States was not contractually bound by the agreement since it was not a party to the agreement; its powers and

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[19] This interpretation of the Compact is shared by Petitioner. In its Amended Complaint, Petitioner states that "[s]urface and groundwater owned by sovereign tribal entities secured by treaty or reservation with the United States is not subject to, and is excluded from governance under, the Red River Compact, as provided in Article II, Section 2.07." 1 J.A. 170, Amended Complaint at ¶ 36.

obligations could not be affected by the Compact. *Id.* at 7. No representative present at the hearing or testifying witnesses expressed a contrary view.[20]

Finally, in the event that the proceedings on remand ultimately determine that Petitioner has a right to excess water in Subbasin 5 under § 5.05(b)(1) of the Compact, any conflict between those rights and the rights of the Nations should be considered in the separate already pending litigation concerning the Nations' rights. *See Chickasaw Nation v. Fallin,* No. 5:11-CV-00927-W (W.D. Okla. filed Aug. 18, 2011); *Okla. Water Res. Bd. v. United States,* No. 5:12-CV-00275-W (W.D. Okla. filed Mar. 12, 2012). Both cases are currently stayed as the Nations and State take part in mediation. *See, e.g.*, Joint Status Report and Joint Motion for a Further 90-Day of this Action at 1-2, Nos. 5:11-CV-00927-W, 5:12-CV-00275 (W.D. Okla. Feb. 19, 2013). This court-supervised mediation, *see, e.g.*, Order, *Fallin*, No. 5:12-CV-00275 (W.D. Okla. Feb. 26, 2013), has continued productively since the parties jointly requested a stay in both cases on March 27, 2012. *See* Joint Motion by the Plaintiffs Chickasaw and Choctaw Nations, the Defendants Governor Mary Fallin, et al., for a 60-Day Stay of this Action, *Okla. Water Res. Bd.*, No. 5:12-CV-00275-W (W.D. Okla. Mar. 27, 2012). If Petitioner is held to

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[20] Even without § 2.07, the Red River Compact would not affect the Nations' Treaty rights to water. Those rights cannot be abrogated unless there is "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999) (quoting *United States v. Dion*, 476 U.S. 734, 740 (1986)) (internal quotation marks omitted). There is no such evidence in the Red River Compact or its legislative history.

have rights to obtain water in Oklahoma under § 5.05(b)(1), the ongoing mediation might well provide a means of resolving Petitioner's claim as well.

CONCLUSION

The Compact does not support Petitioner's claim that it may enter Oklahoma to harvest water in Reach II, Subbasin 5. That claim is also wholly inconsistent with Petitioner's prior conduct in seeking to buy water from the State of Oklahoma and the Nations. For these reasons, and those set forth in the Respondents' brief, Petitioner's claim should be rejected, and the decision below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEF

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TARRANT REGIONAL WATER DISTRICT,

Petitioner,

v.

RUDOLF JOHN HERRMANN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE STATES OF COLORADO, IDAHO, INDIANA, MICHIGAN, NEVADA, NEW MEXICO, UTAH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The adage "good fences make good neighbors" aptly expresses the interests of the *amici curiae*, seven States that rely on the language of interstate compacts to delineate interstate water rights and provide a framework for cooperation on issues involving water use. As the Chief Justice has explained, conflicts like the one at issue here "would be grounds for war" in the international context. *South Carolina* v. *North Carolina*, 558 U.S. 256, 289 (2010) (Roberts, C.J., concurring in the judgment in part and dissenting in part). In our federal system, States instead negotiate and join compacts to settle disputes implicating their sovereignty.

Petitioner, however, is advocating for an approach to interstate compact interpretation that would nullify another State's law and allow Petitioner to cross the boundaries of Oklahoma and appropriate water for transport across state lines. Petitioner points to no provision of the Red River Compact authorizing this intrusion on Oklahoma's sovereignty, instead relying on the *absence* of language that would specifically prohibit it. Petitioner then maneuvers around contrary provisions of the Compact by labeling them "boilerplate." And Petitioner invokes the Dormant Commerce Clause in an attempt to invalidate Oklahoma's water apportionment laws as "protectionist," even though the Congressionally approved Red River Compact—which expressly permits compacting States to "regulate within [their] boundaries the appropriation, use, and control of water"—

necessarily empowers the compacting States to pass laws ensuring that in-state surface water will not be diverted across state lines.

In the view of *amici curiae*, the bargain struck by the compacting states should be conclusive of this dispute. The language of an interstate compact, like a good fence, is the best tool to ensure neighborly cooperation among compacting States in the long run.

The importance to the *amici* States of the issues presented here cannot be overstated. The States rely on the language of interstate compacts to equitably apportion water rights in a manner that (1) provides for a reliable water supply; (2) secures to States, in perpetuity, their respective shares of water, which they can develop as needs and economic conditions dictate; and (3) respects the States' sovereignty and authority over intrastate water appropriation and administration. Across the United States, dozens of interstate compacts equitably apportion rights to hundreds of interstate streams and tributaries. Although this case concerns only the Red River Compact, the *amici curiae* have a strong interest in the methods and principles the Court applies to interpret it.

SUMMARY OF ARGUMENT

I. This case must be decided based on the language of the Red River Compact and with an understanding of the purpose of the Constitution's

Compact Clause, which allows coequal sovereigns to clarify their relative rights with the blessing of Congress. Petitioner's arguments regarding preemption, implied compact rights, and the Dormant Commerce Clause are off the mark.

A. Petitioner's argument that the presumption against preemption of State law does not apply is contrary to the bedrock understanding of States that enter into interstate compacts. They do so to exercise their sovereignty, not to undermine it. If the plain language of an interstate compact may be read to be consistent with a compacting State's law, that is the reading it should be given.

B. Interstate compacts should be interpreted to mean what they say. No portion of them is "boilerplate," to be ignored as Petitioner contends. When States set out to negotiate an interstate compact, they do so with an eye toward a long future of organizing their affairs under the compact's language. They do not anticipate that compacting States will seek to create implied rights contrary to express compact language, as Petitioner seeks to do. The *amici* States have entered into many interstate compacts over the decades, some of which include the kind of language Petitioner would label as "boilerplate." That this language is common does not mean that it is irrelevant; to the contrary, its wide use is an indication of its importance. If this kind of language can be renegotiated through litigation, the certainty and stability that interstate compacts are designed to promote would be called into question.

C. Finally, Dormant Commerce Clause claims have no place in litigation that is governed by the terms of a Congressionally approved compact. Congressional approval of compact language—even language that may be described as "protectionist"—insulates the policies embodied in the compact from judicial Dormant Commerce Clause review.

II. Interstate water compacts conclusively and permanently settle the issue of equitable apportionment of an interstate stream. When unanticipated hydrologic issues arise, compacting States are not free to renege. Although drought conditions and the increasing water needs of North Texas might justify new agreements among members of the Red River Compact, they do not justify a new judicial equitable apportionment that is contrary to the one negotiated over the course of two decades, approved by Congress, and in place since 1980.

ARGUMENT

I. Interstate compacts are carefully negotiated agreements between coequal sovereigns; their language—not the Dormant Commerce Clause—is dispositive of disputes like this one, and they should not be read to undermine State sovereignty.

"The states cannot make war, or enter into treaties," but the Constitution's Compact Clause provides them a vehicle for formally managing interstate affairs: "they may, with the consent of Congress,

make compacts and agreements." *Louisiana* v. *Texas*, 176 U.S. 1, 22 (1900); *see also* U.S. Const., art. 1 § 10, cl. 3. Once Congress ratifies an interstate compact, it becomes not just a binding agreement, but "a law of the United States," *Texas* v. *New Mexico*, 462 U.S. 554, 564 (1983), and "part of the statutory law of [the compacting] States," *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 399 (1979). Given this rarefied status, States do not enter into interstate compacts lightly. The four compacting States of the Red River Compact, for example, spent over two decades negotiating its terms.

For several reasons, interstate compacts are the favored method for many states—especially those in the arid and semi-arid regions west of the 100th meridian—to determine how to apportion rights to interstate streams. Interstate compacts provide much-needed certainty regarding the water supply that will be available for each State to develop in perpetuity; this is particularly important because it can take years to plan and complete water infrastructure projects. *See, e.g.*, *People ex rel. Simpson* v. *Highland Irrigation Co.*, 917 P.2d 1242, 1249 (Colo. 1996) ("The Compact was executed between the states and approved by Congress to ensure Colorado and Kansas a secure and lasting apportionment of the waters of the Arkansas River.").[1] Moreover, when

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[1] *See also* James S. Lochhead, *An Upper Basin Perspective on California's Claims to Water from the Colorado River, Part I: the Law of the River*, 4 U. DENV. WATER L. REV. 290, 292 (2001)

(Continued on following page)

interstate water rights are clearly delineated, compacting States may negotiate in good faith against a clear legal framework. Uncertainty about the meaning and application of compact language hinders this cooperative process.

Additionally, interstate compacts, when properly enforced, avoid protracted litigation in which judicial decrees supplant interstate negotiation of equitable apportionment. *See Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 105 (1938) ("[R]esort to the judicial remedy is never essential. . . . The difficulties incident to litigation have led States to resort, with frequency, to adjustment of their controversies by compact. . . ."). *Ex ante*, States prefer to negotiate the equitable apportionment of interstate water rather than leave the issue to litigation.

Finally, compacts promote State sovereignty and preserve State autonomy over intrastate water appropriation and administration. If a State can rely on an interstate compact's language, it is free to make *intra*state water apportionment policy without separately negotiating with the other compacting States as to each statute or rule on the subject.

("A reliable allocation of supply provides a legal framework through which the federal government and the states can manage the Colorado River to meet changing demands and values. Therefore, each state has a vital stake in assuring the maintenance and enforcement of that framework.").

The importance and constitutional status of interstate compacts in our federal system leads to three conclusions relevant to this case.

A. The presumption against preemption should apply to interstate water compacts, which involve issues traditionally left to State policy.

States do not enter interstate compacts to sacrifice their sovereignty; they do so to *exercise* their sovereignty. This is especially true for interstate water compacts, which involve policy issues that have always been the primary responsibility of the States. Thus, contrary to the arguments of Petitioner and the United States (as *amicus curiae*), the presumption against preemption that usually applies to questions regarding the validity of State law is entirely appropriate.

When interpreting the meaning of an interstate compact—particularly one that involves a policy issue traditionally committed to the States—the Court should not infer that the States have surrendered their sovereignty. "[I]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth* v.

Levine, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996)).

"[E]ach State has full jurisdiction over the lands within its borders, including the beds of streams and other waters," *Kansas* v. *Colorado*, 206 U.S. 46, 93 (1907), and the federal government has always viewed the regulation of water rights as primarily a State issue.[2] Especially with respect to "the arid lands of the Western States," there has been "a consistent thread of purposeful and continued deference to state water law by Congress." *California* v. *United States*, 438 U.S. 645, 653 (1963). Congressionally approved interstate water compacts should therefore be read to *protect* intrastate water regulation, not hinder it.

Petitioner and the United States argue that an interstate compact is "the product of two or more States exercising their sovereign prerogative to negotiate a collaborative solution to a common problem." Br. for Pet'r at 41; *see* Br. for the U.S. as *amicus curiae* at 17. This is precisely correct. But it does not

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[2] Indeed, under the McCarran Amendment, 43 U.S.C. § 666, the United States has agreed to be subject to the jurisdiction of state courts in state stream adjudications. *See United States* v. *Dist. Ct. of Cnty. of Eagle*, 401 U.S. 520, 522 (1971). In these suits, the United States is "deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty" and is "subject to the judgments, orders, and decrees of the court having jurisdiction." 43 U.S.C. § 666(a).

follow that the traditional and important presumption against the preemption of State laws[3] does not apply. Br. for Pet'r at 41; Br. for the U.S. as *amicus curiae* at 16–17. Petitioner argues that the Red River Compact grants Texas an implied right to appropriate water within Oklahoma's borders, and the Compact therefore preempts Oklahoma law regarding intrastate water apportionment. This gets it backwards. In the view of the *amici curiae*, States do not enter into interstate compacts because they wish to surrender their sovereignty; they do so to clarify their rights, enabling them to make intrastate policy without fear that a State law will be struck down in litigation such as this.[4]

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[3] Respondents argue that a preemption analysis is unnecessary in this context and the Court should require a "clear statement" before inferring that compacting States have negotiated away their sovereignty. Br. for Resp'ts at 29. The *amici* States agree that, regardless of whether a state law is analyzed under the presumption against preemption or under the background principles that apply to all interstate compacts, the outcome should be the same. It is inappropriate to infer from silence a surrender of State sovereignty.

[4] *See* Delph E. Carpenter, Legal Advisor to the Colo. Governor, *Address on the Application of the Reserve Treaty Powers of the States to Interstate Water Controversies* (1921), *available at* http://hdl.handle.net/10217/37424 ("[T]he final allocation or limits of use agreed upon must be of such a nature as to leave each of the contracting States free to develop according to changing future necessities *and with dominion over the stream, as a natural resource, with all rights of local sovereignty and eminent domain, subject only to the limitation voluntarily fixed by compact*." (emphasis added)).

B. The provisions that Petitioner labels "boilerplate"—which are similar to provisions in other interstate water compacts—are part of the bargained-for agreement among the four compacting States and should not be read out of the Compact.

Interstate disputes like this one must be resolved based on the language of the applicable compact; federal courts should not read absent provisions into a compact or alter the meaning of bargained-for language that has been approved by Congress. The *amici* States are subject to various compacts with provisions similar to those Petitioner labels as "boilerplate," yet none of the *amici* States believe those provisions lack substantive meaning, particularly when the provisions inform the integrity of a State's borders.

The interpretation of an interstate compact ultimately rests on the language of the compact itself. "[N]o court may order relief inconsistent with [a compact's] express terms." *Texas* v. *New Mexico*, 462 U.S. at 564. As its recent decisions have emphasized, this Court is "especially reluctant to read absent terms into an interstate compact given the federalism and separation-of-powers concerns that would arise were we to rewrite an agreement among sovereign States, to which the political branches consented." *Alabama* v. *North Carolina*, 130 S.Ct. 2295, 2312–13 (2010). This is true "no matter what the equities of the circumstances might otherwise invite." *Id.* at

2313 (quoting *New Jersey* v. *New York*, 523 U.S. 767, 811 (1998)). Petitioner, however, seeks both to ignore the plain terms of the Red River Compact and to read new terms into it; only by doing so may Petitioner be awarded the relief it seeks.

Several provisions in the Red River Compact expressly affirm the signatory States' authority to control the use and appropriation of water within their boundaries. *See* Red River Compact §§ 1.01(a), 2.01, and 2.10(a). For example, section 2.10(a) of the Red River Compact—which, as part of the Compact's "General Provisions," applies to each reach of the Red River, including Reach II, Subbasin 5—states that "[n]othing in this Compact shall be deemed to . . . [i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, not inconsistent with its obligations under this Compact." Petitioner argues that the Court should dismiss this express language as "boilerplate." Br. for Pet'r at 3, 38–39.

This Court's recent precedent highlights the importance of general compact provisions protecting State sovereignty. *See Alabama* v. *North Carolina*, 130 S.Ct. at 2306 (applying a general compact provision preserving the "rights enjoyed by sovereign states" and ruling that because the compact at issue did not specifically authorize an interstate commission to impose monetary sanctions, none could be imposed on a compacting State). The integrity of these provisions is highly relevant to the *amici*

States. Petitioner's approach would cast doubt on the validity of numerous so-called "boilerplate" provisions in many interstate compacts. For example,

- The Colorado River Compact[5] provides, "The provisions of this article shall not apply to or interfere with the regulation and control by any State within its boundaries of the appropriation, use, and distribution of water." Colorado River Compact, Art. IV(c), authorized by 43 U.S.C. § 617.[6]

- The Upper Colorado River Basin Compact[7] provides, "The provisions of this Compact shall not apply to or interfere with the right or power of any signatory State to regulate within its boundaries the appropriation, use and control of water, the consumptive use of which is apportioned and available to such State by this Compact." Upper Colorado River Basin Compact, Art. XV(b), Pub. L. No. 81-37, 63 Stat. 31, 41 (1949).

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[5] The compacting States of the Colorado River Compact are Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming.

[6] The Colorado River Compact may be found at 70 CONG. REC. 324 (1928).

[7] The compacting States of the Upper Colorado River Basin Compact are Arizona, Colorado, New Mexico, Utah, and Wyoming.

- The Republican River Compact[8] provides, the "right [to construct a reservoir] is subject to the rights of the upper state" and "construction and operation of such facility shall be subject to laws of such upper state." Pub. L. No. 78-60, 57 Stat. 86, 89 (1943).

- The Arkansas River Compact[9] provides, "Nothing in this Compact shall be construed as impairing the jurisdiction of Kansas over the waters of the Arkansas river that originate in Kansas and over the waters that flow from Colorado across the state line into Kansas." It further provides, "[N]othing in this Compact shall be construed as supplanting the administration by Colorado of the rights of appropriators of waters of the Arkansas river in said state." Arkansas River Compact, Art. VI.A, Pub. L. No. 81-82, 63 Stat. 145, 149 (1949).

- The South Platte River Compact[10] provides, "Nebraska agrees that compliance by Colorado with the provisions of this compact and the delivery of water in accordance with its terms shall relieve

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[8] The compacting States of the Republican River Compact are Colorado, Kansas, and Nebraska.

[9] The compacting States of the Arkansas River Compact are Colorado and Kansas.

[10] The compacting States of the South Platte River Compact are Colorado and Nebraska.

> Colorado from any further or additional demand or claim by Nebraska upon the waters of the South Platte River within Colorado." South Platte Compact, Art. VII, Pub. L. No. 69-37, 44 Stat. 195, 200 (1958).

These provisions are not meaningless "boilerplate." They promote the very purpose of the compacts: to give compacting States the freedom to set intrastate water apportionment policy, subject to their compact obligations, without fear of objection from the other compacting States.

But Petitioner seeks not only to invalidate important compact provisions; Petitioner also seeks to imply a new provision into the Compact, which would grant it the right to cross Oklahoma's boundaries to appropriate water for transport back to Texas. Petitioner acknowledges that "[t]o supply omissions [in a compact] transcends the judicial function." Br. for Pet'r at 34 (quoting *Iselin* v. *United States*, 270 U.S. 245, 251 (1926)). Yet "supplying an omission" is precisely what Petitioner advocates; no provision of the Red River Compact gives Petitioner the right it claims. Petitioner would "convert [the Compact's] utter silence on an issue into contractual ambiguity," *New Jersey* v. *New York*, 523 U.S. at 784 n. 6 (1998), and would fill that ambiguity with a new provision that favors its position. Petitioner should not be allowed to alter through litigation the bargain the four Compacting States struck decades ago.

In general, a compact's silence is not construed as an invitation to intrude on a compacting State's sovereignty. For example, Article VIII of the Rio Grande Compact—to which Colorado, New Mexico, and Texas are parties—grants the Commissioner for the State of Texas the specific power, under specific conditions, to require Colorado and New Mexico to release water from storage. Pub. L. No. 76-96, 53 Stat. 785, 790 (1939). This language has been understood as limited to the specific authorizations in Article VIII; the States have not understood the compact to encompass additional implied restrictions on intrastate water policy. As Respondents explain, Petitioner's claimed cross-border right to appropriate water from another State, in the absence of express language creating that right, is unprecedented. Br. for Resp'ts at 28–34.

C. The Dormant Commerce Clause does not apply to issues governed by interstate compacts approved by Congress.

The Dormant Commerce Clause is meant to avoid "economic protectionism" and "prevent a State from retreating into . . . economic isolation." *Dep't of Revenue of Ky.* v. *Davis*, 553 U.S. 328, 337–38 (2008) (internal citations omitted). This description simply does not fit interstate water compacts, which are mutual agreements that outline each State's share of a common resource. Because these agreements require the consent of Congress, they represent an *exercise* of the federal commerce power, not a violation of it. *Cuyler v. Adams*, 449 U.S. 433, 439–40 (1981)

("The requirement of congressional consent is at the heart of the Compact Clause. . . . [T]he Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority."). Congress' commerce power does not "lay dormant" in this context; Congress instead "take[s] affirmative action consenting" to State regulation, making arguments about economic protectionism—like the ones Petitioner raises here—irrelevant. *See Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 421 (1946).

Once a compact determines the interstate allocation of water, the individual States use their normal intrastate process to administer water rights, ensuring each State will retain the benefit of its share of compacted water. This is vitally important to the *amici* States. They rely on the language of their numerous interstate compacts—not litigation under the Dormant Commerce Clause—to inform the substance and structure of their intrastate water apportionment schemes. If their laws were vulnerable to Dormant Commerce Clause challenges from other compacting States, the certainty created by interstate compacts—indeed, the very reason the compacts were negotiated in the first instance—would be undermined.

Here, the right to use the Red River was equitably apportioned between Arkansas, Louisiana, Oklahoma, and Texas by the Red River Compact. Congress approved and adopted the Compact in 1980, making it federal law. As a result, the issues presented in this

case cannot be resolved with reference to the Dormant Commerce Clause.[11] Rather, whether a water user in Texas may divert Red River water directly out of Oklahoma for use in Texas is a question only of compact interpretation.

II. Arguments about equitable apportionment among Oklahoma and Texas are irrelevant: interstate water compacts conclusively settle whether a stream has been apportioned "equitably."

The primary goal of interstate water compacts is to create certainty regarding each State's respective water allocations. Interstate water compacts apportion water in perpetuity; once an interstate compact becomes effective, the determination of whether an interstate stream is apportioned "equitably" has concluded.[12] Future disputes are limited to the proper

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[11] To support its Dormant Commerce Clause claim, Petitioner relies chiefly on *Sporhase* v. *Neb. ex rel. Douglas*, 458 U.S. 941 (1982), which held that Nebraska's statutory limitations on out-of-state groundwater exports violated the Dormant Commerce Clause. But as Respondents explain, Br. for Resp'ts at 54–56, *Sporhase* does not apply. The groundwater at issue in *Sporhase* was not subject to an interstate compact. Here, in contrast, Petitioner's asserted right to Oklahoma's surface water is explicitly governed by the Red River Compact.

[12] Petitioner appears to conflate the issues of interstate water apportionment and *intra*state administration of water rights. *See, e.g.*, Br. for Pet'r at 27 ("The Compact apportions Reach II, Subbasin 5 water without a word about state lines."). The equitable apportionment of an interstate stream establishes

(Continued on following page)

interpretation of the relevant compact. "[C]ourts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress." *New Jersey* v. *New York*, 523 U.S. at 811 (parenthetically quoting *Arizona* v. *California*, 373 U.S. 546, 565–66 (1963)).

Petitioner and the United States (as *amicus curiae*) have argued that Texas is suffering a water shortage due to intense drought, and they suggest that the Court should consider Texas's future water needs in answering the questions raised in this case. *See* Pet'n for Cert. at 3–4; Br. for the U.S. as *amicus curiae* (Pet'n Stage) at 18. The *amici* States sympathize with Texas's circumstances. The seven-state Colorado River Basin has been suffering a persistent drought for over a decade, since the year 2000, and rising demand for water in the Lower Basin States—Arizona, California, and Nevada—places additional stress on water supplies. But the Colorado River Basin States are bound by the interstate agreement they entered decades ago, regardless of changes in

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rights *among* States, not *within* them. *Cf. South Carolina* v. *North Carolina*, 558 U.S. at 281 (Roberts, C.J., concurring in the judgment in part and dissenting in part). Ordinarily, once States negotiate an equitable apportionment through an interstate compact, an individual water user's right to access compacted water is a matter of state law. *See New Jersey* v. *New York*, 345 U.S. 369, 373 (1953) (declining to allow the City of Philadelphia to intervene in an original jurisdiction action because it would be improper for the Court to be "drawn into an intramural dispute over the distribution of water within the Commonwealth").

hydrologic conditions since that time—and the same is true for Texas. A "free-form exploration of the practical consequences of the parties' agreement" and "reliance on evidence outside of the Compact to introduce ambiguity into Compact terms, is both contrary to [this Court's] precedents and unfair to the parties." *Oklahoma* v. *New Mexico*, 501 U.S. 221, 247 (1991) (Rehnquist, C.J., concurring in part and dissenting in part). Moreover, water use issues that may have been unanticipated at the time the Red River Compact was negotiated can be met by means other than rewriting the Compact through litigation.

For example, the Colorado River Basin States, together with the federal government, have collaborated on several initiatives that comply with the equitable apportionments established by the Colorado River Compact. These successful efforts include the Colorado River Interim Surplus Guidelines; the 2007 Interim Guidelines for Lower Basin Shortages and Coordinated Operation of Lake Powell and Lake Mead; and Minutes 317, 318, and 319 to the Mexican Water Treaty.[13] Without the certainty provided by the Colorado River Compact, these initiatives would have

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[13] *See* Colo. River Interim Surplus Guidelines, 66 Fed. Reg. 7772 (Jan. 25, 2001); Colo. River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead, 73 Fed. Reg. 19873 (Apr. 11, 2008); Treaty on the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Nov. 14, 1944, U.S.-MX, Minute 317 (June 17, 2010), Minute 318 (Dec. 17, 2010), Minute 319 (Nov. 20, 2012), T.S. 994, 59 Stat. 1219.

been much more difficult to implement.[14] Similar options may be available to Texas to address drought conditions and population growth. But reopening issues resolved by the Red River Compact will serve only to undermine the integrity of interstate water compacts generally, disrupting settled expectations and weakening the foundations on which the States have built new solutions to ongoing hydrologic problems.

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[14] Although cooperation on water issues can be complicated, the certainty of each State's legal rights and obligations makes it possible. In agreeing to the 2001 Interim Surplus Guidelines and the 2007 Interim Guidelines for Lower Basin Shortages and Coordinated Operation of Lake Powell and Lake Mead, the seven Colorado River Basin states collaborated to identify flexibilities in the system without undermining the certainty of the Colorado River Compact; the Consolidated Decree of the Supreme Court, reported in *Arizona* v. *California*, 547 U.S. 150 (2006); the 1944 Mexican Water Treaty; and various federal statutes, which together form the Law of the Colorado River. *See, e.g.*, James H. Davenport, *Softening the Divides: The Seven Colorado River Basin States' Recommendation to the Secretary of the Interior Regarding Lower Basin Shortage Guidelines and the Operation of Lakes Mead and Powell in Low Reservoir Conditions*, 10 U. DENV. WATER L. REV. 287, 290, 292-93 (2007); *see also* James H. Davenport, *Less is More: A Limited Approach to Multi-State Management of Interstate Groundwater Basins*, 12 U. DENV. WATER L. REV. 139, 177–78 (2008).

CONCLUSION

The judgment of the court of appeals should be affirmed.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
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No. 11-889

IN THE

Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,

Petitioner,

v.

RUDOLF JOHN HERRMANN ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF OF CITY OF DALLAS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Red River Compact, which allocates to each of the signatory States an "equal share" of the water in a specified subbasin, preempts discriminatory Oklahoma laws that prevent certain signatory States from obtaining their equal share of that water.

2. Whether Congress's approval of Compact language providing that the Compact shall not "be deemed . . . to interfere" with each State's "appropriation, use, and control of water . . . not inconsistent with its obligations under this Compact" manifests an unmistakably clear congressional consent to discriminatory state laws.

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STATEMENT OF INTEREST[1]

Amicus City of Dallas supplies water services to approximately 2.4 million customers in Dallas and twenty-seven surrounding communities. As one of the largest and fastest-growing metropolitan areas in the nation, the Dallas-Fort Worth Metroplex has a vital need for reliable sources of water – a demand that will increase exponentially in the coming decades, with the region's population projected to more than double in the next fifty years. Making Dallas's need even more imperative is that there is a broad consensus among climatologists that the North Texas region will face worse droughts during the next one hundred years than were faced during the last hundred years.

Following extensive review, the City has determined that the importation of water from the Red River Basin in Oklahoma would provide a cost-effective and environmentally responsible method of meeting these essential water needs. For these reasons, the City has entered into an interlocal cooperation agreement with petitioner Tarrant Regional Water District (TRWD) to share in the allocation of any water in Oklahoma that is apportioned to Texas through this litigation, and to share associated costs with TRWD, including litigation costs. The City thus is a beneficiary of the Red River

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[1] The parties have consented to the filing of *amicus* briefs. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Compact and has a direct and material interest in its proper construction.

SUMMARY OF ARGUMENT

The court of appeals' conclusion that the Red River Compact implicitly prohibits each compacting State from accessing water outside its own boundaries frustrates the Compact's manifest purpose and ignores those States' shared expectations. As this Court has consistently recognized, an interstate compact is a contract and accordingly must be construed in accordance with the parties' intentions, including their understanding of the agreement's purposes. Here, the Compact was expressly intended to ensure an equitable allocation of the water in the Red River Basin among the compacting States. That purpose, the parties understood, could be effectuated only by giving each State an equal share of the runoff water originating from Reach II, Subbasin 5 and of the excess water flowing into that subbasin. Otherwise, the region's single largest metropolitan area would be left with woefully inadequate water supplies even as it experienced an unprecedented growth in population and demand. Yet that perverse result is precisely what the decision below accomplishes.

Section 5.05(b)(1) of the Compact must be construed against the backdrop of the Red River Basin's history and geography, each of which indicates that Oklahoma was an expected source of water for the Metroplex region at the time of the Compact's negotiation. Several Oklahoma reservoirs in Reach II, Subbasin 5 originated as federal projects undertaken at the urging of Oklahoma legislators, who secured

federal funding by asserting that the reservoirs would supply water to cities in Texas, including Dallas and Fort Worth. Thus, many of the water sources at issue in this case are the product of Congress's consistent practice of addressing the area's water needs on a regionwide basis, rather than leaving each State to fend for itself. That judgment reflects the physical, environmental, and climatological realities of the region, which consistently provide southeastern Oklahoma with a far greater volume of usable water than is available in the Texas portion of the river basin. All of these considerations were well known to the parties to the Compact.

That the decision below undermines the Compact's purposes is all the more apparent when one considers the impact it will have on residents of North Texas. The region encompassing the Metroplex is projected to continue its rapid population growth in the coming decades, and the resulting demand for water will far outstrip the region's currently available supplies. Absent the development of substantial new sources, the Metroplex will face massive water shortages that will have devastating socioeconomic consequences for the region and beyond. To avoid that result, North Texas water planners have spent millions of dollars on comprehensive studies aimed at identifying and evaluating potential water management strategies. On the basis of those studies, Dallas concluded that the importation of the water in question from Oklahoma is a more environmentally responsible and cost-effective approach than other proposed alternatives. By rendering that option unavailable, the court of appeals' decision imposes an unnecessary

additional burden on the region as it endeavors to avoid an enormous natural resources catastrophe resulting from the projected massive water shortages. The compacting States surely never intended their agreement to operate in such a manner.

ARGUMENT

I. The Compacting States Understood That Surplus Oklahoma Water Could Be Used To Offset Inherent Supply Limitations In The Metroplex Region.

The Compact was negotiated against the backdrop of longstanding historical and geographic factors that uniformly pointed to Oklahoma as an expected source of water for the Metroplex region. This background was well understood by the parties at the time the Compact was executed. First, the compacting States knew that Congress had in mind the water needs of the entire region, including the Dallas-Fort Worth Metroplex, when it agreed to fund the construction of new water sources in southeastern Oklahoma. Second, the compacting States knew that the region's topography, environment, and climate would significantly limit the amount of usable water flowing into Texas, while providing Oklahoma with a consistent surplus.

1. From the late 1940s to the late 1950s, Texas experienced an historic "Drought of Record."[2] In

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[2] *See* Richard Parker, *As Texas Dries Out, Life Falters and Fades*, N.Y. Times, Aug. 14, 2011, at SR6, *available at*

response, starting in the early 1950s, Dallas began taking steps to conserve its existing water supplies, including requiring all municipalities that received water from the City to comply with restrictions on water use.[3] In addition, Dallas implemented measures to obtain alternate sources of water, such as renovating, leasing, and borrowing water wells and contracting with the U.S. Army Corps of Engineers to obtain water from two then-dry lakes in North Texas.[4] These measures proved insufficient, however, and therefore the Dallas City Council authorized the filing of an application for an "emergency diversion" of seventy-five million gallons per day from the Red River.[5] By February 1954, Dallas had constructed and put into operation a pump station and pipeline to

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http://www.nytimes.com/2011/08/14/opinion/sunday/as-texas-dries-out-life-falters-and-fades.html?_r=0. Tree trunk core samples indicate that Texas has experienced several thirty- and forty-year droughts in the five hundred years before rainfall records were kept starting in 1895. *Id.* There is a broad consensus among climate models that the American Southwest will become drier in the next one hundred years and that this transition to a more arid climate is already underway. *See* Richard Seager et al., *Model Projections of an Imminent Transition to a More Arid Climate in Southwestern North America*, 316 Science 1181, 1183-84 (2007), *available at* http://www.sciencemag.org/content/316/5828/1181.full.pdf?sid=db10ebfd-1633-4562-98cb-d01a8c049a54.

[3] *See* M. E. Bolding & Erie H. Bolding, *Origin and Growth of the Dallas Water Utilities* 154-56 (1981).

[4] *Id.* at 157-160, 168.

[5] *Id.* at 157.

transport the water from the river to a Dallas reservoir.[6]

Despite those efforts, Dallas's water superintendent announced in August 1955 that Dallas had only about an eight-month supply of water remaining before its lakes would be completely dry unless the area received appreciable rains.[7] Not until the late summer of 1956 did "heavy and copious" rains fall in the Dallas area, which eased the drought and enabled Dallas to stop using water from the Red River the following year.[8] Thus, Dallas had relied on "emergency water" from the Red River for three years during a period of "severe drought." *See Oklahoma Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 681 F. Supp. 1470, 1479, 1480 (N.D. Okla. 1988) (FOF 49, 55).

These events prompted efforts to develop a long-term, regionwide solution to the area's growing water supply needs. Beginning in the mid-1950s, Oklahoma officials urged Congress to approve federal projects to construct or modify reservoirs on the Oklahoma side of the Red River basin in order to provide greater storage capability for the region. One of the principal asserted justifications for those proposals was the anticipated future water demands of cities in North Texas. At legislative and administrative hearings, the two U.S.

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[6] *Id.* at 153, 159.

[7] *Id.* at 168.

[8] *Id.* at 174, 176.

Senators from Oklahoma repeatedly stated that the costs to the federal government associated with developing these reservoirs would be offset by repayment contracts between Texas water providers and the Army Corps of Engineers. *See, e.g.*, U.S. Army Corps of Engineers, Tulsa District, Transcript of Public Hearing, Preliminary Examination Report on Hugo Reservoir & Substitute Reservoirs, Kiamichi River and Tributaries, Oklahoma Red River Basin, at 21 (Sept. 4, 1956) (Sen. Kerr) ("[C]ommunities both here and within central Oklahoma, and, yes, there in north Texas, will be knocking at the doors of the Army Engineers and of those able to supply that water, standing in line with the money in their hands . . . saying, 'We are ready to help provide economic justification and economic compensation for these reservoirs.'") (available at Library of Congress); *id.* at 24 (Sen. Monroney) ("Let's don't worry too much about whether Fort Worth or Dallas might take some of our water . . . because if these projects are built to the size I pray God we will build them . . . they will be able to supply it."); *Hearings Before a Subcommittee of the Committee on Public Works on H.R. 12080*, U.S. Senate, 84th Cong. 190 (1956) (Sen. Monroney) ("[T]he water for sale to municipalities, such great municipalities as Dallas and Fort Worth . . . will not only reimburse the cost of the upstream dams, but it will carry the cost of the auxiliary dam, the dry dam located at Millwood."); *id.* at 197 (Sen. Monroney) ("These [dams] have hydro and municipal water supply and even attract Dallas and Fort Worth to come up there and get it" and would promote "availability of water for two States, some in Texas

and some in Oklahoma, that are suffering and have no other water supply . . . .").

The Army Corps of Engineers accepted these arguments and consistently invoked the Metroplex's growing water needs in its recommendations to Congress. In 1957, for example, the Corps submitted a report to Congress recommending, among other projects, the construction of additional reservoirs on the Oklahoma portion of the Little River, a Red River tributary flowing through Reach II, Subbasin 5. The Corps cited North Texas's water needs as a key factor supporting the projects. *See* H.R. Doc. No. 170, 85th Cong., at X (1957) (quotation of Oklahoma governor describing "a request . . . from a city in Texas" for "substantially more storage in the project area under discussion" and noting that "[t]he expanded use of water and the pressing demands for municipal, industrial and power needs for it persuade us to believe that we cannot overdevelop these projects"); *id.* at 22 ("[I]t is considered that potential users of this water should not be limited in location to the Little River Basin, but should include municipalities and industries within a radius of 100 miles or more, possibly as far away as the Oklahoma City or the Dallas and Fort Worth areas."). In turn, Congress authorized the project, "substantially in accordance with the recommendations" in the report. Flood Control Act of 1958, Pub. L. No. 85-500, § 203, 72 Stat. 297, 309.

The same type of regional analysis led to the development of other Oklahoma reservoirs. In a 1962 report recommending modification of the Hugo

Reservoir on the Kiamichi River and the construction of two additional reservoirs in Oklahoma, the Corps repeatedly explained that these sources could provide a necessary future water supply for the Dallas-Fort Worth area. *See, e.g.*, Senate Doc. No. 145, 87th Cong., at 15 (1962) ("Water supplies for the urban and industrial development in the region are becoming inadequate. The Kiamichi River Basin offers an excellent potential source of future water supply for the central Oklahoma-north Texas region."); *id.* at 19 ("Representatives of Oklahoma City and smaller cities of Oklahoma, and Fort Worth and Dallas, Texas, expressed interest in obtaining future water supplies from the Kiamichi Basin."); *id.* at 21 ("The Cities of Dallas and Fort Worth, Texas, have stated they anticipate a future need for water from southeast Oklahoma, possibly from the Kiamichi River Basin."); *id.* at 23-24 ("The development of the water conservation plan for Kiamichi River recognized that the authorized Boswell Reservoir on the contiguous Boggy Creek to the west and the authorized reservoirs in the Little River Basin to the east of Kiamichi River are additional sources of future municipal and industrial water supply for parts of Oklahoma, Arkansas, and Texas."); *id.* at 204 ("The metropolitan centers of Oklahoma City, Dallas, and Fort Worth, northwest and southeast, respectively, of the Kiamichi River Basin, are going to need additional water supplies to sustain the anticipated growth. Therefore, the reservoirs in the Kiamichi River Basin could provide the water supply for these metropolitan areas."); *id.* at 248 ("Because of the abundant rainfall, this area is being considered more and more as a

source of water supply for central and southeast Oklahoma and northern Texas"). Here again, Congress directed that the projects be implemented substantially in accordance with the Corps' recommendations. Flood Control Act of 1962, Pub. L. No. 87-874, § 203, 76 Stat. 1173, 1187.

Thus, many of the water sources to which Oklahoma is now claiming exclusive access are the product of federal projects undertaken for the specific purpose of creating a sustainable water supply for the region as a whole, including the Metroplex. Congress was aware, moreover, that the region's increasing water demand was driven in large measure by the growth of the Dallas-Fort Worth area.

This historical background, well known to the compacting States, must inform the construction of the Compact's terms. In particular, the parties' agreement that each State would "have equal rights to the use of" excess water in Reach II, Subbasin 5 (Compact § 5.05(b)(1), 94 Stat. 3311) must be read in the context of Congress's consistent practice of addressing the area's water supply needs on a regionwide basis.

2. In addition to historical considerations, the compacting States were aware of several physical and environmental factors that would substantially limit Texas's ability to access a twenty-five-percent share of excess water in Reach II, Subbasin 5 within its own borders. The Tenth Circuit deemed such evidence categorically irrelevant to the construction of the Compact. *See* App. 44a n.3. But this Court has made clear that, "[a]s with all contracts," interstate compacts are to be interpreted "according to the intent

to the parties, here the signatory States." *Montana v. Wyoming*, 131 S. Ct. 1765, 1771 n.4 (2011). That inquiry necessarily includes consideration of the agreement's purposes. *See, e.g.*, *New Jersey v. New York*, 523 U.S. 767, 785 (1998) (assessing whether State's interpretation "would frustrate the primary purpose of the Compact"); *Oklahoma v. New Mexico*, 501 U.S. 221, 230-31 (1991) (adopting interpretation that "actually promote[s] one of the purposes stated in Article I of the Compact").

Here, the Compact expressly states that one of its intended purposes is "[t]o provide an equitable apportionment among the Signatory States of the water of the Red River *and its tributaries*." Compact § 1.01(b), 94 Stat. 3305 (emphasis added). As the United States has recognized, evidence showing that a prohibition on out-of-state water would frustrate that purpose – and that the compacting States were aware of that likelihood – is "relevant extrinsic evidence supporting an interpretation that a State may divert its share of water from outside of its boundaries." U.S. Cert. Br. 13. At least two categories of such evidence are present here.

First, the parties knew that the region's topography would severely restrict the amount of Reach II, Subbasin 5 water accessible within Texas. "Reach II, Subbasin 5 encompasses 'that portion of the Red River, together with its tributaries, from Denison Dam down to the Arkansas [-] Louisiana state boundary . . . .'" App. 36a (citation omitted); *see also id.* 52a (map). Thus, the subbasin includes a section of the Red River's main stem, along with adjacent land

on either side of the river. However, although the river forms the boundary between Oklahoma and Texas, it was long settled at the time the Compact was executed that the border between the two States was at the river's south bank, meaning that the riverbed was (and is) entirely within Oklahoma. *See Oklahoma v. Texas*, 256 U.S. 70, 92-93 (1921); *United States v. Texas*, 162 U.S. 1, 90-91 (1896).[9] It thus was known to the compacting States that the Reach II, Subbasin 5 water flowing into Texas would include no portion of the Red River's main stem; rather, the water would be limited to amounts flowing in tributaries, runoff, and the like. *See* U.S. Cert. Br. 14 n.7 ("Under the court of appeals' interpretation of the Compact, petitioner could not divert water from the river's main stem."). As the parties undoubtedly recognized, this was a significant limitation on the volume of Reach II, Subbasin 5 water that could ever be expected to flow into Texas. The parties surely would have viewed that restriction as a substantial impediment to Texas's ability to access its twenty-five-percent share using only water within its own borders.[10]

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[9] Subsequently, Texas and Oklahoma entered into a compact recognizing the boundary as the vegetation line along the south bank of the river. Red River Boundary Compact, Pub. L. No. 106-288, 114 Stat. 919 (2000).

[10] The parties' shared understanding was bolstered by a 1970 engineering report showing that substantially less than twenty-five percent of the freshwater flowing into Subbasin 5 was located in Texas. *See* Pet. Br. 9 & n.5, 44. Moreover, there was no possibility that a change in the Red River's shoreline could

Second, inherent environmental factors created a sharp difference in the amount of usable water available on either side of the Red River. In a statewide water plan issued within a few years of the Compact, Texas noted that it was unable to make full use of the water available to it in the Red River basin because of the high concentration of natural pollutants in Lake Texoma, a reservoir constructed by the Army Corps of Engineers on the river's main stem. *See* Texas Dep't of Water Resources, *Water for Texas: A Comprehensive Plan for the Future* 10 (1984) ("High chloride concentration in Lake Texoma in the Red River Basin . . . preclude[s] full utilization of the water resources" of that basin.).[11] The State further noted that the "[q]uality of ground water" in the region encompassing the Metroplex was diminished by high "[f]luouride concentrations." *Id.* And "[s]urface-water quality" suffered due to factors inherent in urban settings. *See id.* (noting "high urban use pressures (dissolved oxygen, suspended solids, phosphates, fecal coliform, algal blooms, and aquatic plants)"). These environmental challenges were well understood in the years surrounding the Compact's execution; indeed, their effects were already being felt. *See id.* ("Smaller cities throughout the area do not have adequate

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divert a portion of the main stem into Texas. *See New Jersey*, 523 U.S. at 784 ("We have long recognized that a sudden shoreline change known as avulsion . . . 'has no effect on boundary' . . . ." (quoting *Nebraska v. Iowa*, 143 U.S. 359, 361 (1892))).

[11] *Available at* http://www.twdb.state.tx.us/publications/State_Water_Plan/1984/Intro_Background.pdf

supplies to meet growth needs. Many are barely meeting current needs.").

During the same period, southeastern Oklahoma was quite literally flush with usable water. This, too, was well known to the compacting States. In its 1980 water plan, the Oklahoma Water Resources Board noted that the region "enjoys abundant rainfall and runoff, providing the area with a potential for extensive water resource development." Oklahoma Water Resources Board, *Synopsis of the Oklahoma Comprehensive Water Plan* 9 (1980).[12] Indeed, the Board projected that, with the completion of additional proposed water projects, "the region could have a total surplus of 3.5 million acre-feet of water per year." *Id.* The surplus would continue to exist even if large quantities of water were transferred from eastern Oklahoma to drier parts of the State. *See id.* at 23 (projecting sufficient water to meet eastern Oklahoma's water needs, "as well as the import needs of central and western Oklahoma").

This context is highly relevant to understanding how the parties intended Section 5.05(b)(1)'s "equal rights" language to function. That provision was adopted at a time when all parties were aware of a pronounced water supply disparity between North Texas and southeastern Oklahoma – an imbalance created in large part by natural and geographic factors that were unlikely to change in the foreseeable future.

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[12] *Available at* http://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/1980%20ocwp%20synopsis.pdf

To adopt the court of appeals' reading is to conclude that Texas nevertheless agreed to limit itself to in-state water, even as the Metroplex region was undergoing rapid growth and was already experiencing significant water shortfalls. Nothing in the Compact's text or negotiation history supports that conclusion. Petitioner's reading, by contrast, gives practical effect to the Compact's stated purpose of "provid[ing] an equitable apportionment among the Signatory States" (Compact § 1.01(b), 94 Stat. 3305) by reflecting the factual realities known to the parties at the time of its negotiation.

II. The Decision Below Would Deprive Millions Of North Texas Residents Of Water Supplies That Are Massive, Environmentally Responsible, And Cost-Effective.

1. The State of Texas has granted Dallas extensive water rights in exchange for the City's agreement to supply water to neighboring "customer cities" in addition to its own residents.[13] Pursuant to that obligation, the City's water department, Dallas Water Utilities (DWU), currently provides water services to approximately 2.4 million customers in Dallas and twenty-seven surrounding communities.[14]

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[13] *See* Dallas Water Utilities, *Dallas' Long Range Water Supply Plan* 8 (2011), *available at* http://www.dallascityhall.com/council_briefings/briefings1111/DallasLongRangeWaterSupply_110211.pdf.

[14] *See* City of Dallas, Interesting Facts About DWU, http://www.dallascityhall.com/dwu/water_interesting_facts.html.

Historically, DWU, petitioner Tarrant Regional Water District, and *amicus* North Texas Municipal Water District have supplied eighty-five percent of all water used in Texas's Region C, which consists of all or parts of sixteen counties in and around the Dallas-Fort Worth Metroplex.[15]

Region C is one of Texas's largest and fastest-growing areas. As of the 2000 census, its population was approximately 5.2 million, which represented more than a quarter of Texas's total population.[16] Within eight years, the region's population had increased by twenty-one percent to over 6.3 million.[17] This rapid growth will only continue in the coming decades. The Texas Water Development Board (TWDB) projects that Region C's population will reach 9.1 million by 2030 and thirteen million by 2060.[18] Dallas County alone is projected to grow from

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[15] *See* Region C Water Planning Group, *2011 Region C Water Plan* ES.1, ES.4 (2010), *available at* http://www.regioncwater.org/Documents/2011RegionCWaterPlan/EXECUTIVE_SUMMARY_Final.pdf; Texas Water Development Board, *Water for Texas: 2012 State Water Plan* 44 (2012), *available at* http://www.twdb.state.tx.us/publications/state_water_plan/2012/02.pdf.

[16] *2011 Region C Water Plan* at ES.3.

[17] *Id.*

[18] *2012 State Water Plan* at 47.

approximately 2.5 million people as of 2010 to nearly 3.7 million by 2060.[19]

As the State of Texas has explained, this rapid rise in population will create a demand for water that will far outpace Region C's currently available supplies. *See* Texas Cert. Br. 4-5. In 2060, Region C is projected to have an available water supply of 1,734,823 acre-feet per year and a water demand of 3,272,460 acre-feet per year.[20] Thus, to meet the projected demand, Region C needs to develop an additional 1,588,236 acre-feet per year.[21] The burden will fall particularly heavily on DWU. Dallas is projected to have an available water supply of 548,580 acre-feet per year in 2060, but its demand is projected to reach 994,168 acre-feet per year by that time.[22] Indeed, the amount of water available from DWU's existing sources is projected to remain essentially unchanged over the next fifty years.[23] The result will be a massive water shortage of over 445,000 acre-feet

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[19] *2011 Region C Water Plan* at 2.5, *available at* http://www.regioncwater.org/Documents/2011RegionCWaterPlan/Chapter%202_Final.pdf.

[20] *2012 State Water Plan* at 47.

[21] *Id.*

[22] *See 2011 Region C Water Plan* at 4E9-10 (Table 4E.1), *available at* http://www.regioncwater.org/Documents/2011RegionCWaterPlan/Chapter%204E_final.pdf.

[23] *Id.* at 3.17, *available at* http://www.regioncwater.org/Documents/2011RegionCWaterPlan/Chapter%203_final.pdf.

per year.[24] Therefore, in accordance with long-range planning initiatives established following the 1950s drought, Dallas has implemented a variety of citywide water-conservation measures, including allowing outdoor watering only twice weekly and prohibiting outdoor watering between 10:00 a.m. and 6:00 p.m. between April and October, when most evaporation occurs.[25] However, even with such efforts, this is a shortage that Dallas's existing sources cannot begin to meet.

The impact that a deficiency of such magnitude would have on the population of Dallas and surrounding communities cannot be overstated. If the region's water needs are unmet by 2060, a single-year drought would cost Region C over $50 billion in state and local business taxes and annual income, reduce employment by more than 500,000 jobs, and trigger a population exodus of nearly 800,000.[26] Moreover, given the importance to the national economy of the Dallas-Fort Worth region – the Nation's fourth most populous metropolitan area and the sixth-largest

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[24] *See id.* at 4A.7 (Table 4A.4), *available at* http://www.regioncwater.org/Documents/2011RegionCWaterPlan/Chapter%204A_final.pdf.

[25] *See* Dallas Water Utilities, Twice Weekly Watering Schedule Now Permanent, http://savedallaswater.com/ordinance/.

[26] *2012 State Water Plan* at 184, *available at* http://www.twdb.state.tx.us/publications/state_water_plan/2012/06.pdf.

contributor to GDP[27] – the effects of such losses would be felt far beyond North Texas itself.

2. Respondents appear to suggest that water sources sufficient to avert this crisis are available within Texas and that "political challenges" are the only obstacles to securing them. Resp. Supp. Cert. Br. 6. That is incorrect. In fact, as comprehensive studies on this issue have shown, acquiring water from Oklahoma is a more cost-effective and environmentally responsible approach than other available alternatives.

Texas's effort to obtain water from Oklahoma is the product of a lengthy evaluation process mandated by state law. In 1997, following a ten-month drought, the Texas Legislature adopted a statewide water planning process in which regionally based groups are required to develop water plans for designated areas of the state.[28] The process is designed to yield "consensus-based" solutions that reflect the input of a broad range of stakeholders: "Regional water planning

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[27] U.S. Census Bureau, *Statistical Abstract of the United States* 26 (2012), *available at* http://www.census.gov/compendia/statab/2012/tables/12s0020.pdf; Bureau of Economic Analysis, U.S. Dep't of Commerce, News Release: GDP by Metropolitan Area, Advance 2010, and Revised 2007-2009 (2011), *available at* http://www.bea.gov/newsreleases/regional/gdp_metro/2011b/gdp_metro0211b.htm.

[28] *2012 State Water Plan* at 19, *available at* http://www.twdb.state.tx.us/publications/state_water_plan/2012/01.pdf.

groups are required to have at least 11 interests represented, including the public, counties, municipalities, industries, agriculture, environment, small businesses, electric-generating utilities, river authorities, water districts, and water utilities."[29] Each of the regional plans is reviewed through a public review process and then submitted to the TWDB, which uses them as the basis for developing a comprehensive state water plan every five years.[30]

In accordance with those requirements, the Region C Water Planning Group in 2010 produced a regional water plan in which it reported the results of a multi-year study of various water management strategies.[31] The Group's review included "[a]lmost every strategy suggested to the region during the planning process."[32] Each strategy was evaluated on the basis of, among other considerations, water quantity and reliability, costs, environmental factors, and impacts on agricultural and rural areas.[33] Out of twenty-nine strategies analyzed, the Group recommended the

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[29] *Id.*

[30] *Id.*

[31] *See generally 2011 Region C Water Plan*, Executive Summary, *supra* note 15.

[32] *Id.* at ES.7.

[33] *Id.* at 4C.24 (Table 4C.6), *available at* http://www.regioncwater.org/Documents/2011RegionCWaterPlan/Chapter%204C_final.pdf.

implementation of twelve, one of which is the acquisition of water from Oklahoma.[34]

A review of the Group's findings makes clear that Oklahoma water has significant benefits over other strategies. Among the seventeen strategies that were not recommended by the Group, twelve were found to involve more significant adverse environmental impacts than the Oklahoma option.[35] Several of those approaches, it was found, would inundate farmlands. *See, e.g.*, 2011 Region C Water Plan at 4D.15 ("The project would inundate 12,250 acres. Ninety percent of the land impacted is cropland or pasture."); *id.* at 4D.16-17 (similar findings as to George Parkhouse Lake (South) strategy); *id.* 4D.20 (similar findings as to Tehuacana Reservoir and Lake Columbia strategies). Other options would cause environmental harm due to the quality of the water. *See id.* at 4D.11-12 ("The lake [Texoma] has elevated levels of dissolved solids, and the water must be blended with higher quality water or desalinated for municipal use," which

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[34] *See id.* at 4D.5-6, 4D.21, *available at* http://www.regioncwater.org/Documents/2011RegionCWaterPlan/Chapter%204D_final.pdf.

[35] *See id.* at 4D.5-6 ("Environmental Factors" column) (Gulf of Mexico; Wright Patman – System; Lake Texoma Not Yet Authorized (Blend); Lake Texoma Not Yet Authorized (Desalinate); Ogallala Groundwater (Roberts County); George Parkhouse Lake North; Neches River Run-of-River Diversion; George Parkhouse Lake (South); Lake Texoma Desalinate; Carrizo-Wilcox Groundwater (Brazos County and vicinity); Tehuacana Reservoir; Lake Columbia).

would have adverse "environmental impacts"). By contrast, obtaining "[r]aw water from Oklahoma [Red River tributaries] . . . would have relatively low environmental impacts," *id.* at 4D.14, particularly since it would not require the construction of new reservoirs but instead would utilize existing water sources.[36]

Of the other five strategies not recommended, three would be more costly than the Oklahoma option. *See, e.g., id.* at 4D.18 (Cypress Basin Supplies (Lake O' the Pines)) ("Lake O' the Pines is about 120 miles from the Metroplex, and the distance and limited supply make this a relatively expensive water management strategy."); *see also id.* at 4D.5 (Lake Livingston), 4D.6 (Lake Wright Patman – Texarkana). Among the other two strategies, one was replaced by an option deemed more feasible, and the other was found to be "difficult to implement because of the need for pipeline development through an urbanized area." *Id.* at 4D.19

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[36] Other environmental considerations have prevented Dallas from implementing a strategy long recommended by City and State water planners. For several decades, the City and the TWDB planned to develop a site along the Upper Neches River known as the Fastrill Reservoir as a water source for the Metroplex. However, the City was precluded from constructing the reservoir when the U.S. Fish & Wildlife Service designated the site as a national wildlife refuge. The Fifth Circuit rejected the City and the TWDB's challenge to the designation, and this Court denied review. *See City of Dallas v. Hall*, 562 F.3d 712 (5th Cir. 2009), *cert. denied sub nom. City of Dallas v. Gould*, 130 S. Ct. 1499 (2010), *and Texas Water Development Bd. v. Dep't of Interior*, 130 S. Ct. 1500 (2010).

(Southside Lake (Lake Ray Hubbard) Reuse; Lewisville Lake Reuse).

The Tenth Circuit's decision renders these conclusions, and the careful process that produced them, all but meaningless. To replace the billions of gallons of Oklahoma water rendered off limits by the court's ruling, DWU and other North Texas suppliers will be forced to implement measures that were specifically not recommended by a broad-based group of experts, through a public review process, either because of their impact on the region's environment, their impact on the public fisc, or both. The decision thus places an additional and unnecessary burden on a region already facing an emerging natural resources challenge of historic proportions.

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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BRIEES

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In The Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,

Petitioner,

v.

RUDOLF JOHN HERRMANN ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE FORT WORTH CHAMBER OF COMMERCE, THE DALLAS REGIONAL CHAMBER, THE GREATER FORT WORTH REAL ESTATE COUNCIL, AND THE DALLAS CITIZENS COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

The Fort Worth Chamber of Commerce is a 501(c)6 membership association with more than 2,000 member businesses throughout North Texas (mostly in Tarrant County) and more than 4,500 individuals who participate in events, committees or leadership positions. The Fort Worth Chamber has consistently been recognized as one of the nation's top economic development organizations in the country. Through business-to-business marketing, educational events, economic development, workforce development and government advocacy, the Fort Worth Chamber assumes a leadership role in making Fort Worth, the 16th-largest city in the United States, a premier location in which to live, work, and do business.

The Dallas Regional Chamber is the area's leading membership-driven business organization committed to promoting economic prosperity by leading economic development, driving improvements in public education, influencing public policy, and catalyzing and advocating for regional partnerships. The Chamber works to ensure that the Dallas region will become the most economically prosperous region – and the most desirable place to live and work – in the United

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[1] No counsel for a party authored this brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. Nor did any person or entity, other than *amici,* their members, or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the blanket consent letters from all parties, on file with this Court.

States. The Chamber is a not-for-profit organization comprised of businesses which represent all facets of the North Texas business community. Their range of members includes sole proprietors, small and medium-sized businesses, and large corporations.

The Greater Fort Worth Real Estate Council is made up of professionals involved in the commercial real estate industry. The mission of The Greater Fort Worth Real Estate Council is to be a unified voice for the commercial real estate industry, influencing action and supporting change to accomplish long-term job growth and enhance the quality of life in the Greater Fort Worth area.

The Dallas Citizens Council is a 75-year-old nonprofit organization made up of 110 CEOs of the city's most prominent businesses who may join by invitation only. It has taken the lead in addressing issues affecting the long-term well being of the Dallas area, such as transportation, water resources, and a variety of civic projects.

Each of these *amici* is interested in this case because of the critical role water plays in the region's economy and the vital importance of nondiscriminatory access to adequate supplies of water to meet the area's growing needs.

SUMMARY OF ARGUMENT

1. The Dallas-Fort Worth Metroplex is an economically vibrant and growing area that makes a tremendous contribution to the regional and national economies. It is home to a wide variety of industries and businesses that depend on reliable and reasonably priced access to water in order to function. If the region is unable to obtain reasonable access to water from nearby sources, and is forced to rely on more distant, unreliable, and expensive sources that may be unavailable in times of critical need, the impact on businesses and the economy will be devastating. The consequences for just so-called Region C, which encompasses the Metroplex, could, by 2060, be $49 billion in lost earnings, $3 billion in lost state and local taxes, and 545,000 lost jobs from a *single year* of drought without adequate water resources. And those consequences are substantial underestimates of the total harm that would result from failing to obtain adequate water supplies.

The critical need for water in the Metroplex region and the devastating consequences of a failure to obtain adequate supplies provide important context for interpreting the Compact and applying the Commerce Clause. It makes Respondent's interpretation of its supposed authority in this area utterly implausible and inconsistent with the rationale for entering into the Compact in the first place and the rationale underlying the Commerce Clause.

2. Even apart from the provisions of the Red River Compact expressly designed to provide Texas, and the Metroplex region in particular, with equal access to water from Reach II, Subbasin 5, the Commerce

Clause exists to eliminate the type of economic Balkanization reflected here and to prevent the hoarding of goods and resources that are essential to the efficient functioning of an integrated national economy. Overt discrimination against exports used to allow businesses to make efficient production decisions squarely offends the anti-discrimination principles this Court has long held to be embodied in the Commerce Clause. Such discrimination is subject to strict scrutiny and must be narrowly tailored, with the burden on the party imposing such discriminatory restrictions to satisfy the elements of such scrutiny. Unlike ordinary state laws subject to lesser scrutiny, laws subject to strict scrutiny are not entitled to a presumption of constitutionality. Rather, when a State engages in overt discrimination against interstate commerce the presumption is precisely the opposite. Contrary to the reasoning of the court of appeals below, any ambiguous provisions or commentary in the Compact that might be read to endorse state control over water resources within its territory are not bolstered by any presumption favoring state laws, but are severely undermined by the strict scrutiny and contrary presumption arising from overt discrimination against interstate commerce. Nothing in the Compact clearly and unmistakably authorizes conduct that would otherwise be a clear violation of the Commerce Clause.

ARGUMENT

I. Non-Discriminatory Access to Water Is Essential to the Business Environment and Economy in Texas and the Nation.

Amici agree with Petitioner that Texas and Petitioner have a proper and lawful expectation under the Compact of access to water allocated to Texas, wherever located. Rather than rehash Petitioner's compelling legal arguments, *amici* will focus on the consequences of disrupting that expectation under the Compact and the role of the Commerce Clause in prohibiting Oklahoma's discrimination against interstate commerce in water.

As Petitioner and other *amici* have noted, The Dallas-Fort Worth Metroplex (which Petitioner Tarrant serves), is a large, populous, economically vibrant, and growing area that has a significant need for water. Its projected requirements for water exceed its current and projected supply, and consequently new, reasonably priced, sources of water are a critical priority. Petitioner's plan to import water from Oklahoma is a significant partial solution to this problem. But Oklahoma's discriminatory restriction on the export of water stands as a substantial obstacle to meeting the water needs of the Metroplex. At a minimum, those restrictions on interstate commerce in water will make it more difficult and more expensive for Tarrant and the Metroplex to obtain the water they need, and it may well make it impossible for the Metroplex to meet all its projected needs in any economically reasonable manner.

While others have discussed the need for water and the consequences of shortage in the Metroplex in general, this brief will focus on the economic consequences of restricting the water resources available to the Metroplex. In short, without access to adequate, reliable, and reasonably priced supplies of water, economic development and growth in the Metroplex will falter, businesses will stay away or leave, jobs will be lost, state and federal tax revenues will decline, and the economy will become more Balkanized and inefficient. Those results are at odds with the purposes behind the Red River Compact, with the purpose and function of the Commerce Clause, and with common sense and sound public policy.

A. The Dallas-Fort Worth Metroplex Makes a Tremendous Contribution to the Regional and National Economies.

To place this case in perspective and to appreciate the consequences of denying the Petitioner access to adequate supplies of water, it helps to understand how productive the Metroplex is when it does have such access. As explained by the Texas Water Development Board in the course of analyzing the State's water needs, the "Dallas-Fort Worth metropolitan area is centrally located in the region, and its surrounding counties are among the fastest growing in the state. Major economic sectors in the region include service, trade, manufacturing, and government." Texas Water Dev. Bd., *Water for Texas 2012 State Water Plan* at 44 (Jan. 2012) (available at http://www.twdb.state.tx.us/publications/state_water_plan/2012/2012_SWP.pdf). Based on numerous factors that make the area a favorable business envi-

ronment, the Metroplex has produced substantial economic growth when it has had access to sufficient supplies of water.

Between 2001 and 2010, the GDP of the Metroplex rose nearly 50%, from roughly $250 billion in 2001 to $374 billion in 2010.[2] To put that in context, the GDPs for Texas and the United States in 2010 were roughly $1.223 trillion and $14.508 trillion, respectively.[3] The Metroplex thus accounted for approximately 30.58% of the Texas GDP and 2.58% of the national GDP in 2010. And those numbers have continued to improve to 33% and 2.88% of the Texas and United States GDPs in 2011, respectively.[4]

In addition to generating substantial GDP, employment in the Metroplex has grown from 2.737 million people in 2001 to 3.004 million people in 2010.[5]

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[2] *GDP of the Dallas–Fort Worth metroplex from 2001 to 2010*, STATISTA (available at http://www.statista.com/statistics/183837/gdp-of-the-dallas-fort-worth-metroplex/).

[3] *See GDP by State* (available at http://www.usgovernmentspending.com/gdp_by_state).

[4] *See, e.g, The Fort Worth Chamber of Commerce 83rd Legislative Session Positions* at 9 (2013) ("The Dallas-Fort Worth metropolitan area * * * produces over 33% of the state's Gross Domestic Product") (available at http://www.fortworthchamber.com/am-site/media/2013-state-legislative-positions.pdf); *GDP by State*, *supra* (in 2011 Texas GDP was $1.308 trillion and U.S. GDP was $14.959 trillion). Texas thus constituted 8.74% of the U.S. GDP in 2011, and the Metroplex constituted 33% of that amount, or 2.88% of U.S. GDP in that year.

[5] Texas Workforce Commission, *Texas Labor Market Information* (as of December 2001 and 2010) (available at http://www.tracer2.com/cgi/dataanalysis/AreaSelection.asp

At present, the Metroplex employs approximately 3.148 million people (as of December 2012), or 26.5% of employment in Texas (11.859 million people) and 2.2% of employment in the U.S (143.060 million people).[6]

The significant economic activity and employment in the Metroplex not only provide support for those who live and work in Texas, they also enable them to purchase goods and services from around the country – contributing to economic growth elsewhere – and to pay substantial taxes to the state and federal governments.

In short, with access to the resources it needs, the Dallas-Fort Worth Metroplex is a vibrant and powerful economic engine producing benefits not just on the local level, but regionally and nationally as well.

B. Access to Water Is a Critical Requirement for Economic Growth.

Central to the past and continued economic success of the Dallas-Fort Worth Metroplex is the availability of reliable and cost-effective water supplies to meet the needs of businesses and residents. "Indeed, the dramatic population and employment growth enjoyed by the Metroplex over the past several decades would not have occurred absent an abundant and re-

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?tableName=Labforce) (selecting MSA 200 defined, Dallas-Fort Worth-Arlington, 2001 and 2010, December, Not Seasonally Adjusted, Employment).

[6] Texas Workforce Commission, *Texas Labor Market Review*, at 10 (Jan. 2013) (available at http://www.tracer2.com/admin/uploadedPublications/2075_TLMR-January13.pdf).

liable supply of fresh water for residential and commercial uses." Bernard L. Weinstein and Terry L. Clower, *An Overview of the Dallas-Fort Worth Area's Long-Term Water and Transportation Needs* at 1 (North Texas Future Fund, Mar. 2004) (available at http://digital.library.unt.edu/ark:/67531/metadc30398/m1/).

Water is an important requirement of the operations of a wide range of businesses and industries, including: manufacturers such as "food processors, paper mills, electronics manufacturers, aircraft assemblers, and petrochemical refineries"; mining companies, such as "coal, oil and gas, and aggregate producers"; steam-electric producers, such as "coal and natural gas-fired and nuclear power generation plants"; livestock producers, such as "feedlots, dairies, poultry farms, and other commercial animal operations; and irrigation for "commercial field crop production." *2012 State Water Plan*, *supra*, at 135. Commercial and institutional users within municipalities also contribute significantly to water demand. *Id.* at 134.

Numerous well-known companies and industries rely on substantial quantities of water to run their businesses. The Miller Brewing Company in Fort Worth and Texas Instruments in Dallas are two of the largest business consumers of water in the Metroplex. "Both industries need a lot of water to produce their products." BJ Austin, *KERA 'Thirsty' Series: Who Uses the Most Water in Dallas-Fort Worth?*, KERA NEWS, May 14, 2009 (available at http://keranews.org/post/kera-thirsty-series-who-uses-most-water-dallas-fort-worth). Miller Brewing uses nearly a billion gallons a year and Texas In-

struments consumes more than two billion gallons. As TI's environmental and energy manager explained to a reporter, "it takes a lot of water to make computer chips." *Id.*[7]

And while the business community is certainly able and willing to conserve in times of shortage, a still-substantial demand for water cannot be avoided. *See* Dave Montgomery, *Rising concern: Water talk makes splash in Austin*, FORT WORTH BUSINESSPRESS, Dec. 22, 2012 ("Many major businesses in the Metroplex have curtailed their water usage through conservation measures but nevertheless must use sizeable amounts of water to carry out their operations.") (available at http://www.fwbusinesspress.com/main.asp?SectionID=13&subsectionID=38&articleID=24826). As described by a spokesman for Lockheed Martin Aero-

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[7] *See also* Dave Montgomery, *Rising concern: Water talk makes splash in Austin*, FORT WORTH BUSINESSPRESS, Dec. 22, 2012 ("Natural gas producers in the Barnett Shale also depend heavily on water for hydraulic fracturing") (available at http://www.fwbusinesspress.com/main.asp?SectionID=13&subsectionID=38&articleID=24826); Jada Brazell, *Water supply an increasing concern for Dallas-Fort Worth area*, PEGASUS NEWS, May 9, 2012 ("In about 100 years, the [NRDC] report warns that the agricultural sector will require 50 percent more water due to the possible climate change.") (available at http://www.pegasusnews.com/news/2012/may/09/water-supply-increasing-concern-dallas-fort-worth/).

nautics in Fort Worth, " 'an adequate, safe and secure supply of water in North Texas [is important] to meet our future needs and for economic development in the region.' " *Id.* Indeed, while all parts of the region are doing their part to conserve water, because the area has significant commercial and industrial activities, it requires more water than areas with less business activity. While that may mean " 'that North Texas needs more water than the rest of the state due to the heavy concentration of manufacturing here, [that] is a good thing in terms of jobs and the regional economy,' " explained the Lockheed spokesman. *Id.*[8]

In addition to the importance of available water for businesses already in the Dallas-Fort Worth Metroplex, access to water is an important consideration for new businesses that could benefit from the

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[8] Any suggestion that the Metroplex is profligate or wasteful in its water consumption thus misunderstands the consumption dynamic. Substantial commercial and industrial use may make the per-capita consumption appear high, but those figures are not a fair reflection of water usage by the non-commercial residents of the area. Notwithstanding the greater water needs created by strong economic growth and activity, both Petitioner and the Metroplex in general are stepping up their efforts to become even more efficient in their water use. *See, e.g.*, Tarrant Regional Water District, *Wetlands Overview* (describing innovative wetlands water reuse program) (available at http://www.trwd.com/Wetlands); Tarrant Regional Water District, *Water Conservation and Drought Contingency Plan* (Apr. 2009) (describing extensive conservation efforts) (available at http://www.savetarrantwater.com/Shared%20Documents/TRWDconservation_drought_plan_final_April_2009.pdf). But improved efficiency will only go so far, and additional supplies of water will remain a critical necessity.

advantages and efficiencies of the Metroplex. But without assurances of access to water, companies may be forced to seek out less advantageous and efficient alternative locales. *See* Montgomery, *Rising concern, supra* (according to the Texas Association of Business, meeting water supply needs " 'is essential' " for Texas " 'to continue to attract economic opportunities' ").

One essential element for business investment and economic growth is confidence that resources such as water will be available when they are needed. Few businesses are eager to invest substantial sums on new or expanded operations if the future availability of a critical resource is in doubt. The very notion of an integrated, efficient, and fluid national economy requires the freedom to move such critical resources to where they are needed. Because building the infrastructure to ensure available water from new sources has a long lead-time, even for nearby sources such as Oklahoma, it is essential that such resources, and the plans to bring them where they are needed, be in place well in advance if businesses are to have the confidence they need to make further investments in the area. As Petitioner's director has explained, "policy-makers 'can't afford to tarry' in mapping the next water resource options beyond 2030 and need to have firm decisions in place by 2015." Montgomery, *Rising concern, supra.* This Court's decision thus will have a substantial impact on the ability of policy-makers to pursue, in a timely manner, the most efficient and rational option for increasing the water resources available to the Metroplex and thereby to

provide the confidence needed to sustain and increase economic growth in the area.

C. The Economic Consequences of Denying the Region Access to Needed Water Supplies Will Be Devastating.

Given the substantial role water plays in the economic activity of the Metroplex, it is hardly surprising to note that the *lack* of access to sufficient water would be destructive to the economy. Indeed, failure to meet water supply needs could lead to "serious social, economic, and environmental consequences." *2012 State Water Plan*, at 175. For example, drought-induced water shortages could have "overwhelming negative implications," including cutbacks in "economic activity in industries heavily reliant on water, which could result in not only job loss but a monetary loss to" the state and local economies. *Id.* Indeed, it is no exaggeration to suggest, as many North Texas leaders have, that the area's "economic viability depends on" ensuring adequate supplies of water.[9]

Beyond such general descriptions of the danger from inadequate water resources, the Texas Water Development Board has studied the more detailed economic consequences of a failure to meet water needs in Texas and in the Metroplex and surrounding areas, known as Region C. Based on economic modeling of the single-year consequences of a drought

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[9] Matthew Tresaugue, *Texas water supply for the future is uncertain*, CHRON, Nov, 12, 2011 (available at http://www.chron.com/news/houston-texas/article/Where-s-tomorrow-s-water-2266277.php).

where supplies were insufficient to meet the State's needs, "Texas businesses and workers could lose approximately $11.9 billion in income in 2010, with that total increasing to an estimated $115.7 billion by 2060. Losses to state and local business taxes associated with commerce could reach $1.1 billion in 2010 and escalate to roughly $9.8 billion in 2060." *2012 State Water Plan*, at 183. Furthermore, failure to meet the State's water needs could result in "an estimated 115,000 lost jobs in 2010 and 1.1 million in 2060" as the result of a single-year drought. *Id.*[10]

While the entire State thus faces serious consequences if its water needs go unmet, Region C – which includes Tarrant County and the Dallas-Fort Worth Metroplex – will face an especially severe economic impact. Thus, in Region C alone, the annual losses from inadequate water supplies during a drought would escalate from a loss of $2.34 billion in income in 2010 to $49.72 billion in 2060. State and local annual loss of business taxes during a drought would escalate from $130 million to $3.06 billion during that period. And annual loss of jobs during a drought would rise from 23,808 full- and part-time jobs lost to 545,676 jobs lost during that same period. *2012 State Water Plan*, at 184 (Table 6.5).

The disproportionate impact of unmet water needs on the Dallas-Fort Worth Metroplex and its neighbors

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[10] "[E]stimated socioeconomic impacts are point estimates for years in which water needs are reported (2010, 2020, 2030, 2040, 2050, and 2060)." *2012 State Water Plan*, at 183. Monetary figures are given in constant 2006 dollars. *Id.* The unadjusted dollar loss obviously would be considerably higher.

can be seen by comparing the state and regional losses and discovering that Region C would account for a large and growing percentage of the State's annual loss from a drought, rising from nearly 20% of the potential lost earnings to 43% of the lost earnings by 2060. Similarly, Region C would account for 12% of the loss in business taxes, rising to 31% of the loss over the same period. And it likewise would account for 21% of the loss in jobs, rising to 50% of the loss over the same period.

More sobering still, these figures do not cover all the likely economic consequences of an inadequate supply of water for the Metroplex and Region C. For example, the measure of economic loss used in the modelling only looks to a limited set of impacts on the companies themselves and their suppliers. It did not include "impacts on businesses that purchase the sector's final product. Thus, the measured impacts of a given water shortage likely represent an underestimate of the losses to a region's economy." *2012 State Water Plan* at 183. And the estimated losses only describe a single-year drought. But "if drought conditions were to recur, the duration would likely exceed a single year and possibly cause actual impacts to the state that would exceed the estimates included in the 2012 State Water Plan." *Id.*

The estimates of economic harm likewise did not include the potential consequences to cities that have issued bonds to finance improvements to their water-related infrastructure. Such bonds are often paid for by the fees municipalities charge for water, and a lack of supply of water could jeopardize those bonds. Indeed, "[c]redit ratings agencies may not have taken

drought issues into account at the level that they should. Extreme disruptions of the water supply of any city would have severe financial consequences." [11]

And finally, failure to secure adequate supplies of water will cripple the ability of the region to attract additional investment and businesses, stifling future economic growth and stunting long-term progress. A "lack of reliable water supply may bias corporate decision-makers against expanding or locating their businesses in Texas." *2012 State Water Plan* at 175. Inadequate "future water supplies could chase away prospective out-of-state industries * * *. 'If we don't have secure water sources for the years ahead,' said Matt Geske, director of government affairs for the Fort Worth Chamber of Commerce, 'they could look elsewhere.'" Montgomery, *Rising concern*, *supra*.

As all of the above demonstrates, the availability of water is an essential component to productive economic activity and the ability of businesses to locate themselves in areas having efficiencies and synergies conducive to economic growth. And the lack of adequate supplies of water is likewise destructive to such efficiencies, synergies, and growth. In drafting the Red River Compact, the signatories and Congress were no doubt fully aware of the importance of this resource for growth and wrote an agreement designed to ensure access to adequate supplies of water. Read with such background in mind, and conscious of the

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[11] Charles B. Stockdale, Michael B. Sauter, Douglas A. McIntyre, *The Ten Biggest American Cities That Are Running Out Of Water*, 24/7 WALL ST., Nov. 1, 2010 (available at http://finance.yahoo.com/news/pf_article_111186.html).

severe harms that will result from allowing Oklahoma to hoard water contrary to the language and purposes of that Compact, the decision below is both legally erroneous and economically disastrous and should be reversed.

II. The Commerce Clause Requires Virtually *Per Se* Invalidation of Oklahoma's Facially Discriminatory Anti-Export Rules.

In addition to the language of the Compact, which ensures Texas access to its equal share of the water in Reach II, Subbasin 5, the dormant Commerce Clause likewise forbids Oklahoma's discriminatory prohibition on the export of water. As Petitioner's brief explains, Oklahoma law concerning water use, appropriation, and sale is facially discriminatory against other States and their citizens. *See* Pet. Br. at 15-19 (describing extensive discrimination against export of water); *id.* at 19 ("The practical upshot of this statutory scheme is a categorical prohibition against permits to appropriate Oklahoma surface water for use in another State.").

The court of appeals rejected Petitioner's Commerce Clause claim, however, because it deemed the Compact to authorize not merely constitutionally unproblematic rules governing water usage, but also discriminatory laws that otherwise plainly violate the Commerce Clause. Pet. App. 24a-28a. It reached this conclusion without identifying any language in the Compact specifically authorizing such discrimination, allowing a signatory-State to prohibit exports, or exempting the signatories from the otherwise applicable rules under the Commerce Clause. Rather, it cobbled

together the requisite supposedly clear statement of congressional consent from the "broad," and notably non-specific, language permitting each State to " 'use the water allocated to it by this Compact in any manner deemed beneficial by that state,' " to " 'freely administer water rights and uses in accordance with the laws of that state,' " and providing that " '[n]othing in this Compact shall be deemed * * * to interfere within its boundaries the appropriation, use, and control of water.' " *Id.* at 24a-25a (quoting selective excerpts of Compact language).

While Petitioner and other *amici* discuss in greater detail the holdings and application of this Court's decisions in *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), and *South-Central Timber* v. *Wunnicke*, 467 U.S. 82 (1984), and the failure of the Compact to provide the unambiguous authorization from Congress required to avoid a Commerce Clause violation, this brief will make just a few supplemental points regarding the purposes of the Commerce Clause and the standards to be used in evaluating the constitutional claim and defense in this case.

First, the fundamental purpose of the Commerce Clause is to avoid the "economic Balkanization" that plagued the States under the Articles of Confederation. *Hughes* v. *Oklahoma*, 441 U.S. 322, 325 (1979). During that earlier period, "each State was free to adopt measures fostering its own local interests without regard to possible prejudice to nonresidents," resulting in a "conflict of commercial regulations, destructive to the harmony of the States." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 224 (1824) (Johnson, J., concurring in the judgment). "If there was any one

object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Id.* at 231.

Oklahoma's anti-export rules are virtually paradigmatic examples of what the Commerce Clause was intended to remedy. The very point of adopting the Commerce Clause was to encourage economic union, unobstructed by the barriers that prevented the efficient movement of goods and resources to where the market could make best use of them. While States are certainly expected to engage in healthy completion within the market, they are barred from such unhealthy – and conflict-producing – competitive tactics as monopolizing the inputs of production or discriminating against buyers and sellers from other States. "By encouraging economic isolationism, prohibitions on out-of-state access to in-state resources serve the very evil that the dormant Commerce Clause was designed to prevent." *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 577-78 (1997).

On its face, Oklahoma's anti-export regime is simply "economic protectionism," *id.*, and a "naked restraint on export" of water, *Wunnicke*, 467 U.S. at 99. Nothing about Oklahoma's scheme suggests any genuine concern with water shortages or the health of its citizens in the relevant part of the State. As Petitioner has noted, even Oklahoma recognizes that water in this part of Oklahoma is abundant, and many multiples of the volume of water sought by Petitioner are left to flow downstream unused and discharge into the Gulf of Mexico. Pet. Br. 14. Under current and

foreseeable circumstances in Reach II, Subbasin 5, therefore, there is not even a colorable claim that Oklahoma's anti-export rule involves a regulation of "the use of water in times and places of shortage for the purpose of protecting the health of its citizens." *Sporhase*, 458 U.S. at 956.

Lacking any colorable need for the water to protect the public health, one might infer that Oklahoma is hoarding its water resources as a means of dampening the attraction to businesses of its neighboring State and perhaps luring some of those businesses to Oklahoma with the prospect of a greater availability of water. But that sort of manipulation of the market to discourage businesses from locating where they might otherwise operate more efficiently is in fundamental conflict with the Commerce Clause. This "'Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal.'" *Wunnicke*, 467 U.S. at 100 (quoting *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 145 (1970)) (citations omitted); *see also id.* ("'the Commerce Clause forbids a State to require work to be done within the State for the purpose of promoting employment'"). That Oklahoma may be seeking to draw businesses away from neighboring States through protectionist restrictions on water access rather than by more direct requirements of home-state production does not change the fundamental nature

of the barrier to commerce, and may well make it worse.

Because Oklahoma's anti-export rule does precisely what this court has held the Commerce Clause forbids – it " 'bloc[ks] the flow of interstate commerce at a State's borders,' " *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978) – it should be subject to strict scrutiny and invalidated.

Second, any potential concerns with the provenance of the "dormant" aspect of the Commerce Clause are unwarranted in this case. As even such a severe critique as Justice Scalia has explained, while he is unwilling to expand the dormant Commerce Clause "beyond its existing domain," *stare decisis* supports the continued application of this Court's long-standing jurisprudence "(1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court." *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 312 (1997) (Scalia, J., concurring). Oklahoma's anti-export regime involves precisely such facially discriminatory laws. This Court has "consistently * * * held that the Commerce Clause * * * precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom." *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 338 (1982). Because Oklahoma's anti-export regime facially discriminates against interstate commerce and is indeed indistinguishable from

past precedent, the full force of this Court's precedents should continue to apply.

Finally, in evaluating Oklahoma's claim of congressional consent to its discriminatory restrictions on water exports, there is no room for any presumption of validity or presumption against preemption. *Cf.* Pet. App. 34a-35a (applying presumption against preemption to the Compact claim). Unlike general challenges claiming that state law is preempted, or violates some constitutional provision that affords the states considerable leeway, under this Court's longstanding dormant Commerce Clause jurisprudence, "[s]tate laws discriminating against interstate commerce on their face are 'virtually *per se* invalid.' " *Fulton Corp. v. Faulkner,* 516 U.S. 325, 331 (1996) (quoting *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.,* 511 U.S. 93, 99 (1994)). While there are some potential defenses against such invalidity, in "assessing respondents' arguments, [this Court] would [apply its] 'strictest scrutiny.' " *Camps*, 520 U.S. at 581 (quoting *Hughes v. Oklahoma,* 441 U.S., at 337). "This is an extremely difficult burden, 'so heavy that "facial discrimination by itself may be a fatal defect." ' " *Id.* at 582 (quoting *Oregon Waste,* 511 U.S. at 101, in turn quoting *Hughes*, 441 U.S. at 337).

Such strict scrutiny is entirely incompatible with any presumptions of constitutionality or against preemption. As an initial matter, once a State engages in conduct that facially violates the Commerce Clause, it effectively forfeits any such presumptions by having so clearly crossed the line of what is constitutional. Having erected "an explicit barrier to com-

merce between the two States," Oklahoma now "bears the initial burden of demonstrating a close fit between the [restriction] and its asserted local purpose." *Sporhase*, 458 U.S. at 957 (citing *Hughes*, 441 U.S. at 336, and *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951)). Such burden-shifting is the precise antithesis of any presumption in favor of state laws.

Furthermore, this Court has frequently struck down facially discriminatory laws without excessive deference to the purported justifications for such discrimination. *See Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342 (1992) ("Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry"). That, too, is inconsistent with any claimed favorable presumption.

The defense of congressional authorization, in particular, is likewise incompatible with any favorable presumptions. As Petitioner explains, Pet. Br. 48, any claimed congressional consent must be expressed in clear and unmistakable terms. Such a clear-statement rule once again illustrates a change in the balance and the presumptions, and has no room for a favorable presumption to be applied to ambiguous congressional language that does not satisfy the rigorous clear-statement requirement. *Cf. Wunnicke*, 467 U.S. at 91-92 ("The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine.").

The mere existence of a compact does not change this deep skepticism against laws that facially and

explicitly discriminate against interstate commerce. That a clearly worded compact provision approved by Congress *could* provide the requisite authorization for laws that discriminate against interstate commerce does not mean that it should be *presumed* to have done so. That reasoning is circular and assumes its conclusion. Any federal law could provide authorization for conduct that would otherwise violate the Commerce Clause, but this Court certainly does not presume such authorization in the name of federalism. Rather, it requires clear language that a statute or other claimed authorization in fact waived otherwise applicable Commerce Clause restrictions. The fact that the authorization claimed here involves a compact makes no difference whatsoever. Indeed, if anything, the fact that Oklahoma claims authority that plainly acts to the severe detriment of other signatories, and contrary to the foundational and integrative aspect of Our Federalism, makes it even less likely that that was what was intended or agreed to by the signatories, much less approved by Congress.[12]

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[12] That one or several States might bear greater burdens under a federal statute is far less improbable than the suggestion that one or more States *agreed* to such unlikely burdens. Particular States might not be able to block federal legislation despite their objection to the burdens imposed thereby. But even a single State has complete power to block a compact containing such unfavorable terms or restrictions: it need only refuse to sign. The notion that the water-poor States in the Compact agreed to grant the water-rich States the power to discriminate against exports and to have Congress waive otherwise existing constitutional protections against such discrimination simply is not credible. Thus, far from creating a presumption in favor of state authority to discriminate

Indeed, the language of the Compact here is a particularly inapt basis for reversing the usual presumptions and burdens that come with strict scrutiny. For example, the savings clause providing that "[n]othing in this Compact shall be deemed to * * * [i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water * * * not inconsistent with its obligations under this Compact," Compact § 2.10, is notably limited in its language. It does not authorize or endorse *any* State water regulation that does not conflict with the Compact, but rather provides that the Compact *itself* shall not implicitly invalidate state laws unless they are contrary to the Compact's terms. Such language says nothing regarding the validity of state laws that are contrary to some *other* supervening prohibition – even a prohibition that Congress has the power to waive.

Under Respondent's theory, Congress has given Oklahoma unrestricted power to control water use within the State subject only to the express terms of the Compact, and not bound by otherwise applicable Commerce Clause restrictions. By that same reasoning Oklahoma's power would likewise be unrestricted by other supervening authority within Congress's purview, such as federal statutes that limit Oklahoma's conduct with regard to water use. Oklahoma thus might just as easily claim the authority to drain wetlands located within the relevant reaches of the

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against commerce, the fact that a Compact is involved here would strengthen the contrary presumption that Congress (and the water-poor signatories) did not agree to any such power.

Compact, notwithstanding that such conduct might be contrary to federal environmental law.

That, of course, is absurd. But the suggestion that free use and the lack of any implied preemption of Oklahoma's water laws exempts the State from other federal laws as well is no less absurd than the suggestion that it exempts the State from the core restrictions of the Commerce Clause. Just as the language does not expressly authorize Oklahoma to violate other federal statutes, it does not expressly authorize it to violate federal constitutional constraints, regardless whether Congress *could have* so provided. The relevant point is that Congress did not so provide in anything remotely resembling the clear and unambiguous language required by this Court's precedents.

CONCLUSION

For the reasons above, this Court should reverse the decision below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEF

No. 11-889

In The

Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,

Petitioner,

v.

RUDOLF JOHN HERRMANN ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* CITY OF IRVING, TEXAS, CITY OF HUGO, OKLAHOMA, AND HUGO MUNICIPAL AUTHORITY IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE* CITY OF IRVING, TEXAS, CITY OF HUGO, OKLAHOMA, AND HUGO MUNICIPAL AUTHORITY IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

The Tenth Circuit's decision, construing the Red River Compact to authorize facially discriminatory state legislation obstructing interstate commerce in water (an increasingly scarce, valuable and essential natural resource), should be reversed by this Court. It is contrary to the standard announced in this Court's landmark opinion in *Sporhase v. Nebraska*, establishing that water is an article of interstate commerce subject to the dormant Commerce Clause.[2] This case presents the Court with the decision either to affirm its existing compact consent analysis set out thirty years ago in *Sporhase*, or somehow to modify or reject that precedent. As it stands, the precedent of the Tenth Circuit's decision provides a basis for comparable restraints on interstate commerce in water

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[1] Pursuant to Rule 37.6, *amici* the City of Irving, the City of Hugo, and the Hugo Municipal Authority affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.3(a), *amici* have obtained the written consent of all parties to the filing of this brief, and copies of those written consents have been filed with the Clerk of the Court.

[2] 458 U.S. 941, 954 (1982) ("Our conclusion that water is an article of commerce raises, but does not answer, the question whether the Nebraska statute is unconstitutional.").

throughout the western United States because most interstate water apportionment compacts among the Western States contain language comparable to the Red River Compact provisions that served as the basis for the Tenth Circuit's authorization of discriminatory legislation.

The interests of the City of Hugo, Oklahoma and the Hugo Municipal Authority (collectively "Hugo") and the City of Irving, Texas ("Irving") underscore the seriousness of Oklahoma's discriminatory legislation and the Tenth Circuit decision regarding the dormant Commerce Clause. Irving, a growing Texas municipality with projected water needs that far exceed current supplies, entered into a contract, the Irving-Hugo Agreement, to purchase water from Hugo to meet those needs. Hugo currently holds water rights from the State of Oklahoma, granted prior to the Red River Compact, for 30,500 acre-feet per year and has a pending application to appropriate significant additional supplies.

Irving and Hugo's exercise of their respective rights and obligations under the Irving-Hugo Agreement is restricted, if not outright prohibited, by the same Oklahoma statutes that are being challenged by Petitioner.[3] The water that is the subject of the

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[3] In order to proceed under the Irving-Hugo Agreement, Irving and Hugo brought their own suit for declaratory judgment and injunctive relief, challenging these Oklahoma statutes under the dormant Commerce Clause. In that case, the Tenth Circuit ultimately ordered the case remanded for dismissal for

(Continued on following page)

Irving-Hugo Agreement is part of Reach II, Subbasin 1 of the Red River Basin, the waters of this Subbasin 1 being apportioned to the State of Oklahoma under the Red River Compact. See Red River Compact, Pub. L. No. 96-564, 94 Stat. 3305 (1980), § 5.01. Thus, the Tenth Circuit's holding, in Petitioner's case, that "the Red River Compact insulates Oklahoma water statutes from dormant Commerce Clause challenge insofar as they apply to surface water subject to the Compact" also forecloses Irving and Hugo's ability to obtain judicial relief under the Commerce Clause and thus to proceed with their interstate water project involving Compact water. See Pet. App. at 51a.[4] Under that analysis of the Red River Compact, Oklahoma is free to preclude an out-of-state water sale by an Oklahoma water right holder such as Hugo, even where the water rights were permitted prior to the negotiation and ratification of the Red River Compact. See Pet. App. at 25a, 26a.

Irving and Hugo are local governments who have the authority and bear the responsibility to manage

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lack of federal jurisdiction, based on its conclusion that Hugo lacks standing as an Oklahoma political subdivision to challenge the Oklahoma statutes under the Commerce Clause of the U.S. Constitution. *City of Hugo v. Nichols*, 656 F.3d 1251 (10th Cir. 2011). This Court denied Irving and Hugo's petition for a writ of certiorari to review that decision on standing. See *City of Hugo v. Buchanan*, Docket No. 11-852.

[4] All citations in this brief to the Petition Appendix ("Pet. App.") are to materials contained in the Appendix made part of Tarrant's Petition for a Writ of Certiorari in Docket No. 11-889.

water resources and provide long-term water supply in their respective jurisdictions. As Petitioner has detailed, Oklahoma enjoys an abundance of water supply far in excess of the needs in that state, and the north Texas region that includes Irving's service area is a rapidly growing metropolitan area, in which cities and other water providers must seek additional sources to meet future water demands. Pet. Br. at 13-15. Hugo is an Oklahoma appropriator of Oklahoma water, who wishes to sell and deliver some of its appropriated water, in excess of regional needs in Oklahoma, to Irving, a Texas purchaser. This is the simple and classic exercise of interstate commerce, through which the compensation paid to Hugo will substantially benefit Oklahoma's regional economy.

Under the Tenth Circuit's analysis of the Red River Compact, however, Oklahoma's anti-export statutes will render infeasible the Irving-Hugo Agreement particularly, and more generally will effectively preclude this needed interstate water market between willing Oklahoma water sellers and willing Texas water buyers. At a time when the pervasive and increasing effects of drought and climate change starkly present the need for more, cooperative interstate resolution of water resource demand and distribution problems, this Court should weigh carefully the effect of the Tenth Circuit's holding, which will instead embolden compact states to enact more parochial and protectionist approaches to water management.

As an Oklahoma water right holder of Compact water, and as parties to an interstate water sale and purchase agreement hampered by the Tenth Circuit's broad reading of congressional consent to Oklahoma's protectionist legislation, Irving and Hugo's unique perspective on this lawsuit will assist the Court in its disposition of this case. Irving and Hugo have a direct interest in the Court's resolution of the merits of the Compact consent question presented in this case, and present relevant arguments not advanced by Petitioner that support reversal of the Tenth Circuit decision on this issue. This brief is filed in order to provide additional context for the far-reaching implications of the Tenth Circuit's decision.

SUMMARY OF ARGUMENT

Irving and Hugo address the second of the two questions presented by Petitioner Tarrant Regional Water District ("Tarrant"), namely whether Congress's approval of the Red River Compact ("Compact"), utilizing language common to most such interstate water compacts, "manifests an unmistakably clear congressional consent to discriminatory state laws." See Pet. Br. at i, 47-55. Because the Tenth Circuit's analysis contravenes this Court's established precedent (i) requiring "expressly stated" or "unmistakably clear" congressional consent to state statutes that otherwise would violate the dormant Commerce Clause, and (ii) finding that consent lacking in equitable apportionment language of interstate water compacts, the

Tenth Circuit's holding that the Red River Compact "insulates" the Oklahoma statutes from dormant Commerce Clause challenge should be reversed. This Compact consent issue presents a substantially important legal and policy question with implications not only for the Red River Compact and its four signatory states, but well beyond that to the dozens of interstate compacts that apportion stream water throughout the western United States using similar terms. The context of Oklahoma's water abundance, Oklahoma's intentionally discriminatory anti-export statutes, and their effect on Oklahoma appropriators (like Hugo) who seek to transact in that excess water, well illustrate the ramifications of the Compact consent issue before this Court.

Although not addressed herein, *amici* Irving and Hugo also support Petitioner's legal position on its first, preemption question presented.

ARGUMENT

I. The Tenth Circuit's analysis of the Red River Compact ignores this Court's prior analysis regarding water apportionment compacts and the dormant Commerce Clause, and creates open-ended opportunity for protectionist action by apportionment compact states.

A. This Court in *Sporhase* expressly considered and rejected compact apportionment of interstate water resources as "persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce."

The Tenth Circuit correctly recognized this Court's "*Sporhase/Wunnicke* standard for congressional consent," under which Congress's intent to immunize state statutes from dormant Commerce Clause requirements must be "expressly stated" or otherwise "unmistakably clear." Pet. App. at 19a-20a; *Sporhase v. Nebraska*, 458 U.S. 941, 960 (1982); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984). Having recited that standard, however, the Tenth Circuit dispenses with this Court's dormant Commerce Clause precedent from *Sporhase* simply by distinguishing it from this case, because *Sporhase* involved Nebraska's attempt to regulate interstate transfer of groundwater that was not subject to an interstate compact. Pet. App. at 23a; see also *id.* at 27a. The Tenth Circuit conducted no analysis guided by *Sporhase*, despite this Court's

consideration and rejection of Compact consent arguments in that case.

The problem with the Tenth Circuit's shelving of *Sporhase* in its consent analysis of the language of the Red River Compact is that it thereby ignored this Court's consideration in *Sporhase* of whether equitable apportionment by an interstate water compact satisfies the congressional consent standard. The *Sporhase* Court considered and expressly rejected arguments made by Nebraska and Amici Curiae States[5] that various federal water legislation and interstate water allocation compacts reflect congressional authorization of state-adopted restrictions on interstate commerce involving water. *Sporhase*, 458 U.S. at 958. Nebraska had argued:

> Congress clearly exempted water resources from application of the Commerce Clause of the Constitution . . . by the specific approval of water appropriation compacts between states on the nation's rivers and waterways.[6]

The Amici Curiae States in their brief even more clearly, and expansively, urged:

> The amici states have enacted laws limiting or prohibiting the export of water for use outside the boundaries of the state. These

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[5] Colorado, Wyoming, Utah, Nevada, Kansas, North Dakota, South Dakota, and Missouri.

[6] Brief of Appellee at *27, *Sporhase v. Nebraska*, 458 U.S. 941 (1982), *available at* 1982 WL 608566.

> statutes are consistent with equitable apportionment decrees of this court and are necessary to implement the interstate compacts consented to by Congress. Implicit in all compacts apportioning interstate waters, and explicit in some, is the assumption that each state may prohibit the diversion of apportioned waters for use outside its boundaries.[7]

The Court could have ruled that such federal law authorities were not applicable to the (non-compact) groundwater at issue (as did the lower courts in this case), but instead it directly addressed the merits of Nebraska's argument – ruling that the proposition was incorrect and that state laws addressing water apportioned by compact are still generally subject to the constitutional restrictions of the Commerce Clause. The *Sporhase* Court explicitly considered whether interstate water compacts (or other federal water legislation) implicitly waive Commerce Clause restrictions, and ruled as follows:

> Although the 37 statutes and the interstate compacts demonstrate Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid*

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[7] Brief of Amici Curiae States at *7, *Sporhase v. Nebraska*, 458 U.S. 941 (1982), *available at* 1982 WL 608568.

> state law to which Congress has deferred. Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce.

Sporhase, 458 U.S. at 959-960 (footnotes omitted, emphasis in original).

By this conclusion, the Court intentionally announced a rule that the equitable apportionment of water accomplished by interstate compacts does not waive otherwise applicable Commerce Clause restrictions. See Douglas L. Grant, *State Regulation of Interstate Water Export*, 3 WATERS AND WATER RIGHTS at 48-38 to 48-39 (Amy L. Kelley, ed., 3d ed. Lexis Nexis/Matthew Bender 2011) ("In other words, Congress' mere consent to the water compacts was not an unmistakably clear expression of intent to authorize unreasonable state burdens on commerce.").[8] The logic of the *Sporhase* Court's treatment of compact apportionment is undeniable: Equating congressional consent to the apportionment of water with consent

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[8] See also Olen Paul Matthews & Michael Pease, *The Commerce Clause, Interstate Compacts, And Marketing Water Across State Boundaries*, 46 Nat. Resources J. 601, 635 (2006); Chris Seldin, *Interstate Marketing of Indian Water Rights: The Impact of the Commerce Clause*, 87 Cal. L. Rev. 1545, 1555 (1999).

to violate dormant Commerce Clause requirements would mean that interstate surface water apportioned by a compact is not subject to the dormant Commerce Clause, while intrastate surface water and underground water remain subject to dormant Commerce Clause restrictions.

This understanding of the *Sporhase* rule is also supported by western states' legislative responses following the Court's decision. Prior to *Sporhase*, fourteen western states limited or prohibited the export of water.[9] Following *Sporhase*, two of those embargo statutes were repealed,[10] one was struck down by a federal district court,[11] and nine states amended or adopted legislation designed at least in part to qualify under the *Sporhase* standards for permissible constraints on interstate commerce in water.[12] Like those states whose pre-*Sporhase* export statutes were repealed or stricken, so also these nine states (Arizona, Idaho, Kansas, Montana, Nebraska, Nevada, Oregon, South Dakota and Utah) are all

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[9] See generally Richard S. Harnsberger, Josephine R. Potuto & Norman W. Thorson, *Interstate Transfers of Water: State Options after* Sporhase, 70 Neb. L. Rev. 754, 817 and Appendix (1991).

[10] COLO. REV. STAT. § 37-81-101 (1973) (repealed 1983); WYO. STAT. § 41-3-105 (1977) (repealed 1983).

[11] N.M. STAT. ANN. § 72-12-19 (1978) (repealed 1983); see *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983).

[12] See Harnsberger et al., *supra note* 9, Appendix. Whether such legislation actually satisfies *Sporhase* standards is undetermined.

"compact states." This state-level response to this Court's *Sporhase* analysis reflects a clear and shared understanding that the dormant Commerce Clause still limits a state's ability to embargo export of its water resources, even where the state is party to one or more interstate water compacts.

As discussed further below, the various provisions of the Red River Compact on which the Tenth Circuit relied to find "broad regulatory authority," see Pet. App. at 25a, 27a, for the "Compact states to protect their apportionments of water," Pet. App. at 3a, see also Pet. App. at 27a, are typical of the terms of many other interstate water compacts involving vast amounts of water resources throughout the western United States. Beyond the direct holding regarding the Red River Compact and its signatory states, this case presents this Court with the opportunity to affirm, or to modify, its conclusion in *Sporhase* that equitable apportionment alone does not manifest congressional intent to insulate a state's discriminatory water statutes from Commerce Clause scrutiny.

B. Under the *Sporhase* and *Wunnicke* analysis of Compact consent, the Red River Compact provisions on which the Tenth Circuit relied do not supply "persuasive evidence" or "unmistakably clear" congressional consent.

Because indisputably there is no "expressly stated" congressional consent in the Red River Compact

that would relieve Oklahoma of the restrictions of the dormant Commerce Clause in regulating its Compact water,[13] the Tenth Circuit's holding can only be justified if such intent is otherwise "unmistakably clear." *Wunnicke*, 467 U.S. at 91-92. To determine congressional consent, the Tenth Circuit therefore correctly focused on the language of the Red River Compact itself. Pet. App. at 23a, 24a. However, the various terms, provisions, and phrases in the Red River Compact on which the Tenth Circuit relied are common provisions found in nearly all of the many interstate water compacts among the western states, and are not properly read to immunize the signatory states from dormant Commerce Clause protections.[14]

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[13] Cf. Pet. App. at 21a-22a (describing and quoting from the opinion of the district court).

[14] Irving and Hugo's compilation of a comparative review of the terms and provisions of these western interstate compacts was made part of the record in their appeal before the Tenth Circuit. See *City of Hugo v. Nichols*, 656 F.3d 1251 (10th Cir. 2011) (consolidated Case Nos. 10-7043 and 10-7044). Accompanying the filing of their amicus brief supporting the petition for certiorari in this docket, pursuant to Rule 32.3 *amici* submitted a letter to the Clerk of the Court describing the material comprising this comparative review and proposing that it be lodged for the Court's consideration of Tarrant's petition. Subsequently, on December 20, 2012, the Clerk's office contacted the undersigned counsel and requested that the material proffered by Irving and Hugo be provided, and same was electronically transmitted to the Clerk's office that same day. Accordingly, this comparative review of compact provisions, the full text of those compacts, and the accompanying map are before this Court for consideration in this docket.

As this Court noted in *Sporhase*, such interstate compacts are "agreements among States regarding rights to surface water." *Sporhase*, 458 U.S. at 959; see also *Montana v. Wyoming*, 131 S.Ct. 1765, 1772 n. 4 (2011) ("As with all contracts, we interpret the [Yellowstone] Compact according to the intent of the parties, here the signatory States."). In this context, general provisions regarding a compact purpose of apportionment of the water resources of a particular basin are certainly not remarkable. See Pet. Br. at 50-51. The clear rule set out in *Sporhase* is that water apportionment by compact is, by itself, not persuasive evidence of congressional consent. *Sporhase*, 458 U.S. at 960. Indeed, a comparative review of certain key provisions of the 21 western interstate water compacts demonstrates that all of these compacts have the nature or purpose of apportionment.

The "non-interference" provision of the Red River Compact is also common language found in other interstate water apportionment compacts. See Red River Compact, § 2.10, Pet. App. at 87a; Pet. Br. at 51. Such general provisions reflect Congress's general deference to state water law, stated in numerous federal statutes including compact ratifications, which this Court acknowledged but found insufficient to immunize water compact states from dormant Commerce Clause prohibitions. See *Sporhase*, 458 U.S. at 959-960. Nearly all of the other western states'

water compacts also contain this type of provision.[15] The Tenth Circuit places significant emphasis on the Red River Compact phrasing that gives each signatory state, as part of the non-interference provision (§ 2.10), "control" over the water allocated to that state. Pet. App. at 25a. Review of the other compacts, however, again demonstrates that at least eight of them use this same phrasing – non-interference means the state's right to regulate within its boundaries the "appropriation, use and control" of water, not

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[15] See Arkansas River Basin Compact, 87 Stat. 569 (1973), art. XI(B); Arkansas River Basin Compact, 80 Stat. 1409 (1966), art. XIII(B); Arkansas River Compact, 63 Stat. 145 (1949), art. VI(A); Big Blue River Compact, 86 Stat. 193 (1972), § 7.2(3); Canadian River Compact, 66 Stat. 74 (1952), art. X(d); Colorado River Compact, 45 Stat. 1057, 1064 (1928), art. IV(c); Pecos River Compact, 63 Stat. 159 (1949), art. VIII; Republican River Compact, 57 Stat. 86 (1943), art. IV; Sabine River Compact, 68 Stat. 690 (1954), *as amended by* 76 Stat. 34 (1962), art. II; Snake River Compact, 64 Stat. 29 (1950), art. IX; Yellowstone River Compact, 65 Stat. 663 (1951), art. XVIII. In the cases of water apportionment compacts that (i) include provisions for basin-wide treatment of certain issues, across state lines, or (ii) do not establish a compact commission, and thus do not require a clarification of state vs. compact commission authority, such a "non-interference" provision would not be expected, and is not found. See Costilla Creek Compact, 77 Stat. 350 (1963), *amending* 60 Stat. 246 (1946); Klamath River Basin Compact, 71 Stat. 497 (1957); Upper Colorado River Basin Compact, 63 Stat. 31 (1949) (basin-wide treatment); and South Platte River Compact, 44 Stat. 195 (1926); La Plata River Compact, 43 Stat. 796 (1925) (no compact commission).

inconsistent with the state's obligations under the compact.[16]

Even the Tenth Circuit's emphasis on the "free and unrestricted use" phrasing, in the Red River Compact provisions that allocate water resources for specific "reaches" and "subbasins" among the signatory states, does not satisfy this Court's standard for unmistakably clear congressional consent. Pet. App. at 26a; see Pet. App. at 87a (§ 4.02 (Reach I, Subbasin 2, water the subject of two of Petitioner's permit applications to OWRB)); see also Red River Compact, § 5.01 (Reach II, Subbasin 1, water the subject of Hugo's water rights and permit applications pending with OWRB). Again, this is common water apportionment compact language – 11 of 18 western states' compacts recognize the right of "free and unrestricted" use (or comparable authorization) of water allocated to a state by the compact.[17] The Tenth Circuit

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[16] See Arkansas River Basin Compact, 87 Stat. 569 (1973), art. XI(B); Arkansas River Basin Compact, 80 Stat. 1409 (1966), art. XIII(B); Big Blue River Compact, 86 Stat. 193 (1972), § 7.2(3); Canadian River Compact, 66 Stat. 74 (1952), art. X(d); Colorado River Compact, 45 Stat. 1057, 1064 (1928), art. IV(c); Pecos River Compact, 63 Stat. 159 (1949), art. VIII; Sabine River Compact, 68 Stat. 690 (1954), *as amended by* 76 Stat. 34 (1962), art. II; Snake River Compact, 64 Stat. 29 (1950), art. IX.

[17] See Arkansas River Basin Compact, 87 Stat. 569 (1973), art. IV; Arkansas River Basin Compact, 80 Stat. 1409 (1966), art. V; Bear River Compact, 94 Stat. 4 (1980), *amending* 72 Stat. 38 (1958), art. V(A); Big Blue River Compact, 86 Stat. 193 (1972), § 5.2; Canadian River Compact, 66 Stat. 74 (1952), art. IV(a); Colorado River Compact, 45 Stat. 1057, 1064 (1928), art. III(a);

(Continued on following page)

incorrectly and overbroadly interprets the phrase "free and unrestricted use" to give a signatory state, in this case Oklahoma, a complete and prospective blank check to discriminate against out-of-state water marketing and use.

Examination of other compact examples further establishes that this interpretation of "free and unrestricted use" is not legally sound. First, one of the interstate stream compacts (to which Nebraska is a party) offered for this Court's consideration in *Sporhase* also includes such provisions. See South Platte River Compact, 44 Stat. 195 (1926), art. III (apportioning tributary waters of Lodgepole Creek, with Nebraska having "the full and unmolested use and benefit of all waters" above the designated point of diversion, and Colorado having "the exclusive use and benefit" of all waters flowing at or below that point). The *Sporhase* Court, however, concluded that "the interstate compacts . . . do not indicate that Congress wished to remove federal constitutional constraints on such state laws." *Sporhase*, 458 U.S. at 959-960.

La Plata River Compact, 43 Stat. 796 (1925), art. II(1), (2)(a); Sabine River Compact, 68 Stat. 690 (1954), *as amended by* 76 Stat. 34 (1962), art. IV; South Platte River Compact, 44 Stat. 195 (1926), art. III; Upper Niobrara River Compact, 83 Stat. 86 (1969), art. V(A)(1). The three compacts that utilize a "basin-wide administration" approach, discussed above, are excluded from this aspect of the comparative analysis because of their fundamentally different approach, disregarding state boundaries.

Second, among the western states' water apportionment compacts there are several that, in sharp contrast to the Red River Compact's provisions, "specifically require consent from the signatory states or from a compact commission before water can be exported outside the river basin." Grant, 3 WATERS AND WATER RIGHTS at 48-39 & n. 220.[18] Typical of such express export consent requirements, Section 5.4 of the Kansas-Nebraska Big Blue River Compact provides: "Neither state shall authorize the exportation from the Big Blue river of water originating within that basin without the approval of the [compact agency's] administration." But Section 5.3 of that same compact also provides: "The State of Kansas shall have *free and unrestricted use* of all waters of the Big Blue River Basin flowing into Kansas from Nebraska in accordance with this Compact. . . ." (emphasis added). If "free and unrestricted use" signifies the outright and absolute power of a compact state to regulate its allocated water even to the point of discriminating against water export, as the Tenth Circuit believes, it is difficult to see how such authorization could be harmonized within a compact that requires approval by another entity before the signatory state can authorize water export.

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[18] See Kansas-Nebraska Big Blue River Compact, art. V, § 5.4, 86 Stat. 193, 197 (1972); Snake River Compact, art. IV, 64 Stat. 29, 31 (1950); Yellowstone River Compact, art. X, 65 Stat. 663, 669 (1951).

Another, more recent, example of an interstate water compact sharply contrasting with the Red River Compact in its detailed provisions restricting out-of-basin water transfers is the Great Lakes-St. Lawrence River Basin Water Resources Compact ("Great Lakes Compact"). The parties to the Great Lakes Compact are the eight Great Lakes States,[19] who had earlier entered into a broader agreement also including the Canadian Provinces of Ontario and Quebec. In October 2008, President Bush signed a joint resolution of Congress consenting to the Great Lakes Compact. See Pub. L. No. 110-342, 122 Stat. 3739 (2008). The Great Lakes Compact encompasses both surface water and groundwater within the Great Lakes-St. Lawrence River Basin, and generally prohibits "[a]ll New or Increased Diversions,"[20] subject to certain clearly delineated exceptions. In that case, although the Compact contains various provisions acknowledging the primary role of each party state in adjudicating and administering water rights applications (termed "Proposals"), at the same time it

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[19] Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Wisconsin, and the Commonwealth of Pennsylvania. The geographic area included under the Great Lakes Compact is shown in the map that is Exhibit 2 in Irving and Hugo's material lodged with the Court in this docket.

[20] "Diversion" is defined therein as a "transfer of Water from the Basin into another watershed, or from the watershed of one of the Great Lakes into that of another by any means of transfer," except for water used in the Basin or a Great Lake watershed to manufacture or produce a product that is then transferred out. Great Lakes Compact § 1.2.

requires that party states act on such Proposals under standards set out in the Compact, and establishes a detailed structure whereby many such Proposals must first be subjected to "regional review" by a body comprised of representatives of each of the eight party states as well as both of the Canadian provinces. See generally Great Lakes Compact §§ 4.3, 4.5, 4.7-4.9, 4.11. Where Congress has consented to water transfer restrictions set out in such detail, it is hard to imagine a more unmistakably clear example of intent to authorize state regulation.

In contrast, like the many other compact examples including provisions for "free and unrestricted use" by a state of its compact-allocated water, these provisions in the Red River Compact do not carry the legal weight that the Tenth Circuit has afforded them. None of the provisions on which the court relied to foreclose dormant Commerce Clause challenges to Oklahoma's anti-export statutes is anything more than the typical compact apportionment language considered and rejected by the *Sporhase* Court. The Tenth Circuit's reading of what it considers to be "broad language of key Compact provisions," Pet. App. at 24a, that "give the Oklahoma Legislature wide latitude to regulate interstate commerce in its state's apportioned water," Pet. App. 27a, is manifestly based on the court's failure to follow this Court's *Sporhase* analysis of compact provisions. Evaluated with that guidance, the Red River Compact does not satisfy this Court's "unmistakably clear" standard for

congressional consent, and the Tenth Circuit's holding should be reversed.

C. The common provisions of water apportionment compacts also demonstrate the far-reaching implications that call for reversal of the Tenth Circuit's Compact consent holding.

Comparison of specific language in the Red River Compact to the terms and conditions of other interstate water apportionment compacts is necessary not only to determine whether congressional approval of this Compact amounts to "unmistakably clear" authorization of otherwise prohibited restrictions on interstate commerce, but it also highlights for this Court the vast legal and economic implications of leaving the Tenth Circuit's Compact consent holding in place. As shown in the compacts map prepared by Irving and Hugo and lodged with this Court, most of the major stream water sources in the western United States are subject to interstate equitable apportionment compacts. Comparative consideration of these compacts' terms makes abundantly clear that the Tenth Circuit's interpretation of language in the Red River Compact would equally apply to the terms of numerous other compacts, and thus the (existing and future) laws of numerous other compact states.

The Tenth Circuit's Compact consent analysis, if not rejected by this Court, has such sweeping effect that it validates the "apportionment equals consent"

argument made by Nebraska and the amici states, and rejected by this Court, in *Sporhase*. Notwithstanding the Court's thirty year-old holding in that case that water is an article of interstate commerce, as a practical matter water allocated by interstate compacts would be utterly vulnerable to states' unilateral protectionism. There is certainly no mistaking these ramifications from the point of view of Respondents' counsel throughout this litigation. Most recently in an article published last summer, they assert that "where Congress has affirmatively apportioned water to a compacting state, the dormant commerce clause is simply inapplicable." Charles T. DuMars & Stephen Curtice, *Interstate Compacts Establishing State Entitlements to Water: An Essential Part of the Water Planning Process*, 64 Okla. L. Rev. 515, 530 (2012). Respondents' counsel, by characterizing all such interstate water compacts as "congressional apportionment," categorically argue that any compact involving states' water allocations and ratified by Congress necessarily demonstrates consent that the dormant Commerce Clause have no effect. *Id.* at 532-535.

Unconstrained by the Commerce Clause, and emboldened by the "wide berth" and "wide latitude" described by the Tenth Circuit, Pet. App. at 27a, 28a, it is easy to foresee many more states taking now-sanctioned actions in the interest of gaining various forms of economic advantage by hoarding their water resources for in-state use. Indeed, there would be nothing to prevent Oklahoma and other compact

states from reverting to outright embargos against export of their water resources. This is precisely the type of "economic Balkanization" the Commerce Clause intended to prevent. Cf. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

This outcome is obviously of paramount concern to cities and other water providers in areas of growing population, water shortage and recurring drought such as north Texas.[21] Indeed, this dispute over "compact water" is only one of several disputes recently brought before this Court, including other cases in which states have brought original actions challenging each other over compact obligations. See generally *Montana v. Wyoming*, No. 137, Orig.; *Kansas v. Nebraska*, No. 126, Orig.; *Texas v. New Mexico*, No. 220141 ORG (motion for leave pending). This pattern illustrates the importance of the Court's carefully construing water compact provisions, so that states cannot simply rely on a defense that their compact "insulates" them from action under questionable circumstances. Enmeshed in this case are the broader national policy implications of facilitating increased parochialism among the states in managing

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[21] Cf. Noah D. Hall, *Interstate Water Compacts and Climate Change Adaptation*, 5 ENVTL. & ENERGY L. & POL'Y J. No. 2 (Fall 2010) (assessing relative risks and legal uncertainty resulting from climate change, for interstate water sources subject to compacts, which comprise over 95% of the nation's available freshwater resources).

trans-boundary water resources, if the Tenth Circuit's analysis of the Red River Compact is affirmed.

The Tenth Circuit concluded its opinion by stating that its role is "not to pass judgment on the economic policy implications of the Red River Compact . . . [but] to ascertain what the Compact says about state regulation of apportioned water." Pet. App. at 51a. Irving and Hugo respectfully submit that, given the flawed Compact consent analysis employed by the Tenth Circuit and the sweeping national importance of its holding, *this* Court's critically important role is either to affirm its existing compact consent analysis set out thirty years ago in *Sporhase*, in the further light of *Wunnicke*, or somehow to modify or reject that precedent.

These challenges to the Oklahoma anti-export statutes, viewed in light of the Red River Compact, frame an issue of tremendous importance to states, local governments, water providers, and indeed all who rely on a vital market in this uniquely essential natural resource. Especially against the backdrop of severe, historic and persistent drought, the Court is confronted with the real potential for compact states to hamper interstate water development as a critical part of interstate commerce. The Court's resolution of this issue will either facilitate or frustrate cooperative solutions to increasingly challenging problems of developing and distributing adequate water supplies to meet demands.

II. Oklahoma's anti-export water laws intentionally discriminate against projects such as the Irving-Hugo Agreement, and forecast the potential for similar approaches by other compact states.

A. Hugo is an Oklahoma appropriator that seeks to sell excess Oklahoma water to Irving.

The City of Hugo, Oklahoma, either in its own name or through the Hugo Municipal Authority (collectively "Hugo"), has held a permit to appropriate water from the Kiamichi River of the Red River Basin since 1954. Through this initial permit, and a second permit acquired in 1972, Hugo is presently the duly authorized appropriator of 30,500 acre-feet of stream water each year from the Kiamichi River. Hugo's rights to these quantities predate both the signing (1978) and the congressional ratification (1980) of the Red River Compact.

In 2002, Hugo applied to the Oklahoma Water Resources Board ("OWRB") for an additional 200,000 acre-feet annually from the Kiamichi River. The OWRB has yet to rule upon this application. Although this permit, if granted, would authorize a substantial increase in Hugo's current appropriation, the total amount of stream water both currently appropriated by and sought to be accessed by Hugo represents only a small fraction of the stream water available in the segment of the Kiamichi River at issue. According to the OWRB, more than 1.8 million acre-feet of adjusted total stream water flows through this segment

annually, and only about 44,000 acre-feet is estimated to be used within Oklahoma. To put these quantities in perspective, the amount of stream water that flows unused through the Kiamichi River and out of Oklahoma every year could more than supply the annual needs of the entire population of New York City. OWRB Status Report to the Office of the Governor, *Joint State/Tribal Water Compact & Water Marketing Proposals, Southeast Oklahoma Water Resources Development Plan*, at 27 (March 2002). The Kiamichi River water in particular is lost to its highest beneficial use if not diverted in Oklahoma, as the Hugo-Irving project would entail; once it reaches Lake Texoma and the Red River downstream from it, the water becomes too salty for municipal use. This unused excess from the Kiamichi is only a small fraction of the 36 million acre-feet of total stream water that leaves Oklahoma in a given year – a quantity that dwarfs the 2.6 million acre-feet that is actually allocated for annual use within the state. OWRB, Oklahoma Water Facts, *available at* http://www.owrb.ok.gov/util/waterfact.php (visited Feb. 19, 2013).

In short, Oklahoma's water supplies are plentiful compared to its needs, and the Hugo area is uniquely situated within the State to reap the potential benefits of this abundance. As an Oklahoma municipality, Hugo possesses a right, guaranteed by the Oklahoma Constitution, "to engage in any business or enterprise which may be engaged in by a person, firm, or corporation. . . ." Okla. Const. art. 18, § 6. Thus, Hugo

should be ideally positioned to transact in its surplus of stream water – a recognized article of interstate commerce – with a willing buyer. Hugo found such a buyer in the City of Irving, Texas, located in a high growth area of north Texas and planning for its future water supply needs. In August, 2008, Hugo and Irving executed a contract whereby Hugo agreed to sell, and Irving agreed to buy, certain volumes of stream water appropriated by Hugo pursuant to both its existing and pending water permits (the "Irving-Hugo Agreement"). From its inception, however, this transaction has faced obstacles imposed by the Oklahoma Legislature that prohibit or burden interstate water exports, for the sole and impermissible purpose of protecting Oklahoma's own economic interests.

B. Various Oklahoma statutes facially discriminate against the permit amendments sought by Hugo and the interstate project planned by Hugo and Irving.

The Tenth Circuit's opinion in Petitioner's case acknowledges that "[s]ome of these statutes require the OWRB to treat permits for in-state and out-of-state water use differently." Pet. App. at 5a. The statutory impediments to the Irving-Hugo Agreement, which are the statutory provisions also challenged by Petitioner in this case, fall into three general categories. In 2002, around the same time that Hugo applied to the OWRB for an additional appropriation from the Kiamichi River, the legislature enacted

the facially discriminatory (and now expired) Oklahoma Moratorium, which created an outright prohibition on "the sale or exportation of surface water and/or groundwater outside this state." OKLA. STAT. tit. 82, § 1B(A), OKLA. STAT. tit. 74, § 1221.A. Still in effect are multiple other provisions designed to prevent Oklahoma residents from selling in-state stream water to nonresidents,[22] and additional provisions enacted in 2009, following the legal challenges brought by Petitioner and separately by Irving and Hugo, that further burden any attempts to transfer Oklahoma stream water for out-of-state use.[23] See H.B. 1483, 52nd Leg., 1st Sess. (Okla. 2009).

Unmistakably, "the overall thrust" of these laws "is to prevent Oklahoma water from being removed from the state." *Tarrant Regional Water Dist. v. Herrmann*, No. CIV-07-0045-HE, 2007 WL 3226812, at *3 (W.D. Okla. Oct. 29, 2007). When considered in light of the Irving-Hugo Agreement, their obstructive effect on the natural flow of interstate commerce as driven by basic principles of supply and demand becomes quite evident. Thus, effective nullification of the Irving-Hugo Agreement by fiat of the legislature is a realistic prospect under these statutes.

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[22] These include: OKLA. STAT. tit. 82, § 105.16(B); OKLA. STAT. tit. 82, § 1085.2(2); and OKLA. STAT. tit. 82, § 1085.22.

[23] These latest provisions include: OKLA. STAT. tit. 82, § 105.12A(B)(1); OKLA. STAT. tit. 82, § 105.12A(D); OKLA. STAT. tit. 82, § 105.12(A)(5); and OKLA. STAT. tit. 82, § 105.12(F).

The Oklahoma Legislature removed any doubt as to its intent to apply direct oversight, and different treatment, of transactions like those planned by Hugo and Irving with the passage of new restrictions in 2009. Among these provisions is a requirement that all permits for out-of-state water use that authorize use of water subject to an interstate compact (including, but not limited to, the Red River Compact) be specifically authorized by an act of the Oklahoma Legislature. OKLA. STAT. tit. 82, § 105.12A(D). The legislature also has continuing oversight over any such permit, which presumably includes the power to later disapprove or restrict the permit even after initial legislative authorization and OWRB approval. *Id.* These 2009 restrictions also: (i) bar the granting of any permit for out-of-state water use that would impair Oklahoma's ability to meet its obligations under an interstate compact (thus placing the burden of satisfying Oklahoma's compact obligations only on out-of-state water users), see OKLA. STAT. tit. 82, § 105.12A(B)(1); (ii) require OWRB to consider, before granting any permit for out-of-state use (but not permits for in-state use), whether the requested water could feasibly be transported elsewhere in Oklahoma to alleviate water shortages, see OKLA. STAT. tit. 82, § 105.12(A)(5); and (iii) subject permits for out-of-state water use (and only out-of-state water use) to OWRB review at least every 10 years, to determine whether material conditions justifying the permit have changed with respect to other water needs and availability in Oklahoma, see OKLA. STAT. tit. 82, § 105.12(F).

Each of these provisions, and all of them collectively, render infeasible a water development project by which an Oklahoma appropriator such as Hugo seeks to sell excess water to a willing Texas buyer such as Irving. At a minimum, these laws jeopardize the viability of any water sale transaction contemplated between residents and non-residents by creating legal uncertainties and contingencies that impose substantial, if not insurmountable, burdens of financing a multi-million dollar project. However, they are more than mere inconveniences to interstate commerce created in the interest of public wellbeing. They were openly enacted with the goal of thwarting projects like that planned under the Irving-Hugo Agreement. As discussed below, the lawmakers who enacted these 2009 provisions did so in unabashed furtherance of purposes impermissible under the dormant Commerce Clause, despite lip-service paid to aims of conservation.

C. Oklahoma's anti-export water laws were enacted with discriminatory and protectionist intent, and burden interstate commerce in water.

Not only do Oklahoma's challenged statutes create layers of conditions and burdens that apply directly to, and inhibit, interstate water sale transactions such as the Irving-Hugo Agreement, they do so without imposing similar requirements on permits for in-state water uses. By their terms, they mandate "differential treatment of in-state and out-of-state

economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Oregon*, 511 U.S. 93, 99 (1994). In other words, they are facially discriminatory, and therefore "virtually per se invalid" under the dormant Commerce Clause unless the state "can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Id.* While a legitimate state interest justifying such discrimination might exist for "demonstrably arid" states that suffer from water shortages "as a whole," *Sporhase*, 458 U.S. at 958, by the assessments of the OWRB itself, Oklahoma is plainly not such a state. Rather, state officials have openly proclaimed economic protectionism as the motivating purpose – a fact that, again, should result in per se invalidity of the legislation so enacted. See *Philadelphia v. New Jersey*, 437 U.S. 617, 623-624 (1978).

While H.B. 1483 was still pending, several Oklahoma legislators, including sponsors of the bill, called a press conference, issued a press release, and announced to the world that the bill was designed to apply legislative oversight to transactions such as the Irving-Hugo Agreement to ensure that Oklahoma water could not be sold on terms they deemed insufficiently beneficial to Oklahoma. See Oklahoma State Senate Press Release, "Lawmakers Share Concerns over Possible Sale of Oklahoma Water to Texas" (May 13, 2009), http://www.oksenate.gov/news/press_releases/press_releases_2009/ pr20090513b.html. In other words, the undisguised motive was to override natural

market forces and buttress Oklahoma's economic advantage over an abundant natural resource. The public comments of State Senator Jim Wilson and State Representative Jerry Ellis make this purpose clear:

> There's a lot of money involved in this. When we talked about it during the Keating Administration we were selling the water too cheap we thought, even though it was a significant amount of money it seemed like. The argument that that's going to help our general fund is not significant unless the rate of the water goes up. So what we're going to do is we're going to try to create enough hurdles so that Texas will have the, uh, decide it's cheaper to desalinate water than it is to buy it from Oklahoma.
>
> . . .
>
> We've got to have a lot of money for this water if, in fact, we sell it.
>
> . . .
>
> This is about creating hurdles . . . obstacles that [out-of-state purchasers] will have to overcome.
>
> . . .
>
> Anything we can do to slow [the sale of water to out-of-state purchasers] down is certainly in our benefit.

See Audio recording of remarks by State Senator Jim Wilson and State Representative Perry Ellis at

May 13, 2009 press conference, http://www.oksenate.gov/news/press_releases_audio_clips/2009_audio_clips/prac200905.html. After H.B. 1483 was unanimously passed by the Oklahoma Senate, Senator Brian Bingman, a co-author of the bill, reiterated this economic protectionist purpose:

> We know the importance of Oklahoma water and the positive economic impact it has on our state,. . . . Oklahoma will now have more control of the protection and distribution of its own water, which will help make us stronger as a state.

Oklahoma State Senate Press Release, "Senate Approves Landmark Water Bill" (May 21, 2009), *available at* http://www.oksenate.gov/news/press_releases_audio_clips/2009_audio_clips/prac200905.html/.

These remarks bring the intended function of these 2009 provisions into sharp relief. In place of the expired (and challenged) Oklahoma Moratorium, which proscribed outright transactions such as the Irving-Hugo Agreement by its plain terms, the Oklahoma Legislature has constructed "oversight" mechanisms that still achieve the same effect – disruption of any proposed interstate transaction involving Oklahoma water that the legislature may deem insufficiently advantageous to Oklahoma interests. With this agenda laid bare, any argument that Hugo's permit applications and the Irving-Hugo Agreement may be allowed to proceed under the present statutory scheme rings hollow. The laws in question facially discriminate against out-of-state buyers of a plentiful

Oklahoma resource, and the Tenth Circuit's Compact consent analysis offers no protection for an Oklahoma appropriator such as Hugo that already holds water rights permits. See Pet. App. at 25a, 26a.

This Court has seen the State of Oklahoma attempt export restrictions on natural resources before:

> The statute of Oklahoma recognizes [gas] to be a subject of interstate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. . . . If States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. . . . To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that "in matters of foreign and interstate commerce there are no state lines." In such commerce. . . . is constituted . . . the welfare of all the states, and that of each state is made the greater by a division of its resources, natural and created, with every other state. . . . This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward, it must be done by the authority of another instrumentality than a court.

West v. Kansas Natural Gas Co., 221 U.S. 229, 255-56 (1911).

Oklahoma's anti-export statutes are now accomplishing what this Court prohibited Oklahoma laws from attempting more than 100 years ago – the arrest of commerce in an abundant natural resource at state lines. To the detriment of Hugo and Irving, and to the potential detriment of any who would freely buy or sell the waters of a state subject to any interstate water allocation compact, the Tenth Circuit has allowed these laws to stand. A great "turning backward" is underway, and predictably will spread to other water compact states. Hugo and Irving respectfully ask that this Court reject the Tenth Circuit's Compact consent analysis, and reverse its holding regarding the Red River Compact.

CONCLUSION

Following the "unmistakably clear" standard established in its opinions in *Sporhase* and *Wunnicke*, the Court should reverse the Tenth Circuit's holding that the Oklahoma statutes are "insulated" or "inoculated" from dormant Commerce Clause challenge as those statutes apply to water apportioned under the Red River Compact.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 11-889

RECORD AND BRIEF

MAR 27 2013

OFFICE OF THE CLERK

In The

Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,

Petitioner,

v.

RUDOLF JOHN HERRMANN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE STATES OF LOUISIANA AND ARKANSAS AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE

The States of Louisiana and Arkansas are Signatory States to the Red River Compact and depend on the Red River's water to support drinking water, agriculture, aquaculture, and industrial uses as well as to maintain the environment and ecology of the Red River, Atchafalaya River, and Mississippi River basins. The Amici Curiae States have a direct interest in the outcome of this litigation, as what Texas' political subdivisions are and are not allowed to do under the Red River Compact will substantially impact the uses of the River in the downstream Amici States.

Both Louisiana and Arkansas share Oklahoma's interpretation of the Compact. The Amici States agree with and adopt as their own Oklahoma's analysis and interpretation of the history and negotiation process of the Red River Compact and share Oklahoma's perplexity regarding the Petitioner's new notion that cross-border water rights were created under the Compact. Further, Louisiana and Arkansas are interested in this matter because a decision favoring the Petitioner would constitute a significant infringement on their sovereignty and a departure of over more than three decades of the implementation of the Compact. Petitioner's tortured construction of the Compact would undermine the Amici States' bargained-for understanding that the Red River Compact safeguarded the States' ability to protect their public trust resources in any manner deemed beneficial. In this case, such protections manifest as repelling intrusions from Texas and its political subdivisions

whenever the Lone Star State's whims for more water are not satiated.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Red River Compact ("Compact" or "RRC") equitably apportions among Arkansas, Louisiana, Oklahoma, and Texas the water of the Red River and its tributaries. Pub. L. No. 96-564, 94 Stat. 3305 (1980). Importantly, although equitable apportionment was undoubtedly the primary purpose of the Compact, an equally notable theme throughout the Compact is the preservation of each Signatory States' sovereign authority to use and regulate the water within its boundaries. An interpretation of Section 5.05(b)(1) of the Compact must be performed through the ordinary rules of statutory interpretation that require all provisions of a Compact be read in context and in light of the efforts by all Signatory States to resolve their dispute through the Compact. The Petitioner would have this Court ignore the context in which the Compact was executed as well as the Compact's explicit, unambiguous, and repeated binding provisions that preserve the Signatory States' authority to "freely administer water rights and uses in accordance with the laws of the state" and the "power of any Signatory State to regulate *within its boundaries* the appropriate, use, and control of water." RRC, §§2.01, 2.10(a).

The Compact effects the division of waters in the Red River among the States, but the right to an absolute, unrestricted use of the water allocated to each State is limited by the boundaries within which that water is located, unless the Compact explicitly provides to the contrary. Tarrant Regional Water District's ("Tarrant" or "Petitioner") suggestion that the Signatory States intended to permit, *implicitly* in an otherwise all-encompassing Compact, the unfettered authority of one party to reach across another State's borders to appropriate water requires that the Court not only disregard the plain language of Section 5.05(b)(1), but also gives no meaning to the clear preservation of State governing authority over intrastate waters that the Signatory States' bargained-for when the Compact was ratified by Congress.

The Compact expressly recognizes and preserves each Signatory States' authority to regulate without restriction – except as otherwise dictated by the Compact – the use of water within its borders. Notwithstanding this clear pronouncement, Tarrant asks this Court to find that the drafters of the Compact intended to make the then-existing and all later-enacted laws of the Signatory States subservient to the rights of a water supplier to reach across state boundaries to divert water. "[E]qual rights to the use of runoff," as provided in Section 5.05(b)(1), simply does not constitute a clear expression by the Signatory States or Congress that this one phrase was added for the purpose of overriding the regulatory authority of the

States over intrastate waters that was otherwise maintained throughout the Compact.

ARGUMENT

I. THE *PLAIN MEANING*, *CONTEXT*, AND *PURPOSE* OF THE RED RIVER COMPACT ALL SUGGEST THAT OKLAHOMA ACTED WITHIN ITS AUTHORITY UNDER THE COMPACT.

All the Signatory Compact States except Texas recognize that the Compact reserves to the States the authority to develop programs such as that by Oklahoma, and absent a clear statement in the Compact to the contrary, the Signatory States should not be presumed to have surrendered their sovereignty over intrastate water. Texas now seeks to garner greater benefits than it bargained for in the Compact, and neither the plain and unambiguous language of the Compact, nor its context or purpose support Texas' or Tarrant's interpretation. In *State ex rel. Dyer v. Sims*, 341 U.S. 22, 27 (1951), this Court noted that,

> [i]t requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own

> ultimate judge in a controversy with a sister State.

Texas and its political subdivision, Tarrant, urge this Court to upset the Compact's bargain purportedly as a consequence of the need for more water. Amici too appreciate the challenges confronting states and their desire for more water. It is a challenge for many states.

Because of the state-controlled regulation of water in general, waterways, such as the Red River, that wholly or partially form the boundary between sovereign states present unique problems of regulation and use. The practical and obvious solution to problems attendant with allocating the usage of waterways subject to the claims of multiple states is through a contractual agreement subject to the approval of Congress under Article 1, Section 10. "The compact – the legislative means – adapts to our Union of sovereign States the age-old treaty making power of independent sovereign nations." *Hinderlider v. La Plata Co.*, 304 U.S. 92, 104 (1938). This is precisely the mechanism employed by Oklahoma, Texas, Louisiana, and Arkansas to provide for apportionment, allocation, and regulation of the shared portions of the Red River. Pub. L. No. 96-564, 94 Stat. 3305 (Dec. 22, 1980).

Through the enactment of the Red River Compact and numerous others like it,[1] both the participating states and the Congress recognize that the regulation of water usage can be accomplished best by interstate agreements. *See* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution: A Study in Interstate Adjustments*, 34 YALE L.J. 685, 699-704 (1925). The organic legislation for all such compacts begins as a contract among the participating states whose interests as the sovereign protectors of their trust resources are the driving forces behind the confection of such agreements. These agreements, which arrive before Congress as complete documents for approval under the Compact Clause, are carefully negotiated contracts, tailored to protect these finite resources in the best interests of the citizens of each signatory state.

Congress' approval of interstate water compacts elevates these agreements to the status of federal law. This elevation serves two purposes. First, it insulates the otherwise protectionist nature of state laws enacted pursuant to the agreements from possible constitutional scrutiny. Second, the only other

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[1] Of particular import to the Amici States are the similarities between the portions of the Red River Compact at issue in this matter and those of the Sabine River Compact (Pub. L. No. 83-578, 68 Stat. 690 (1954)) and the Arkansas River Basin Compact (Pub. L. No. 81-82, 63 Stat. 145 (1949)). *See e.g.*, Ryan M. Seidemann, *Water and Power: The Sabine River Authority of Louisiana – A Review of Property Disputes, Hydropower, and Water Sales*, 25 TUL. ENVTL. L.J. 389, 405-412 (2012).

mechanism available to regulate interstate relations regarding shared water boundaries would be through the enactment of comprehensive federal water legislation, a reality that would upset more than two centuries of individual state water regulation.

This latter point is at least a tacit acknowledgment that one size does not fit all when it comes to the regulation of water as among states. It is widely accepted that there is a major divide, largely along geographic lines, as to how the individual states treat water and water rights. *See* Mark S. Davis & Michael Pappas, *Escaping the* Sporhase *Maze: Protecting State Waters Within the Commerce Clause*, 73 LA. L. REV. 175, 180-183 (2012). A singular nationwide approach to water regulation (which would, admittedly, obviate the need for water compacts) is impractical, as the regulation of water in Louisiana, a traditionally water-rich state, would be substantially different from the regulation of water in, say, Nevada, a traditionally water-poor state.

Accordingly, with interstate compacts as the principal viable mechanism for settling water disputes between states – absent resort to this Court and requesting an equitable apportionment, it is axiomatic that, eschewing the federal one-size-fits-all approach to water regulation, the entire purpose behind water compacts is to maintain existing state water law, while creating waterway-specific solutions to the regulation and use of shared water bodies. Little doubt exists that, in an interstate context, certain state restrictions on water use might qualify as

protectionist, possibly violating the dormant Commerce Clause. However, compacts such as the Red River Compact are authorized by Congress with a distinctly protectionist bent, favoring the protection of sovereign waters within state boundaries over interstate commerce.

Consequently, it would stretch Compact interpretation beyond logic to suggest, as Petitioner does, that the Compact is not shielded from the dormant Commerce Clause. The express purpose of the Compact is to "remove causes of controversy" and to "provide a basis for state or joint state planning and action by ascertaining and identifying each state's share in the interstate water of the Red River Basin and the apportionment thereof." RRC, §1.01(e). This includes insulating compacts from dormant Commerce Clause challenges. *E.g.*, *Intake Water Co. v. Yellowstone River Compact Com'n*, 769 F.2d 568, 570 (9th Cir. 1985) ("When Congress approved this compact, Congress was acting within its authority to immunize state law from some constitutional objections by converting it into federal law."), *cert. denied*, 476 U.S. 1163 (1986).

A. The Compact's Plain Language Supports Oklahoma's Regulation.

Indeed, the express and unambiguous terms of the Red River Compact permit Oklahoma's restrictions. The Compact expressly preserves the individual States' water regulations for waters within their borders. The language in section 2.01 is clear: "Each

Signatory State *may use* the water allocated to it by this Compact in *any manner deemed beneficial by that state.*" RRC, Art. II, §2.01 (emphasis added). It further provides that "[e]ach state *may freely administer water rights and uses in accordance with the laws of that state*," subject only to availability and apportionment under the Compact. *Id.* (emphasis added). And the Compact explicitly recognizes that it shall not be deemed to "[i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, . . . not inconsistent with its obligations under this Compact." RRC, §2.10(a). For each state's allocation in Reach II, Subbasins 1-4, it grants "unrestricted use" of its water. RRC, §§5.01-5.04. Nothing about any of these terms is equivocal or unambiguous.

B. Petitioner's Interpretation of the "Equal Rights" Language in the Compact Strains Credulity.

Tarrant's reading of Section 5.05(b)(1) provides unique insight into why it erroneously interprets the Compact. Section 5.05(b)(1) provides, in pertinent part (emphasis added):

> [t]he Signatory States shall have **equal rights to the use** of the runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or

> more, provided no state is entitled to more than twenty-five percent (25%) of the water in excess of 3,000 cubic feet per second.

Two critical observations flow from this provision: (1) this section provides to the States equal rights to use Subbasin 5 water, not equal shares or unrestricted use of water; and (2) "provided no state is entitled to more than twenty-five percent" is a limitation on that use, not a guarantee of a quantity of water. Notwithstanding the clear language, Tarrant would read section 5.05(b)(1) as providing the Signatory States with an "equal share" (Pet. Br. at 9) and giving to Texas an unrestricted "right to a 25% share" (Pet. Br. at 16), an interpretation that is contrary to the plain language of this provision.

Consistent with the plain language of the Compact, Louisiana and Arkansas interpret "equal rights to the use of" to mean that "each signatory state has the same opportunity and entitlement to use up to 25 percent of the excess water *in its state and under its state law.*" *Tarrant Regional Water Dist. v. Herrmann*, 656 F.3d 1222, 1246 (10th Cir. 2011). While it may be unfortunate that Tarrant is facing increased water demands, these demands have no bearing on the meaning of the Compact, nor do they require the Court to re-write the Compact in a way that diminishes the authorities reserved to the Signatory States that were so carefully protected when drafting the Compact. Tarrant is not without a source of water within the State of Texas, and the Compact is clear that Tarrant's right to use Texas' allocation of Subbasin

5 water is limited to water within Texas' boundaries. Indeed, each States' rights to the use of Subbasin 5 water is limited to the use of such water from within each State's waterways.

Nowhere in the Compact are the intrastate water laws of the Signatory States made subservient to States acquiring their "equal share." In fact, had Oklahoma, or Louisiana or Arkansas for that matter, intended to undermine their own water law schemes as signatories to the Compact, it is doubtless that the Compact would so state. It does not. Louisiana and Arkansas, therefore, join Oklahoma in recognizing that the Compact unambiguously provides that intrastate waters are to be governed by intrastate laws and that Tarrant misconstrues the "equal rights of the use of" language in such a way that requires speculation as to its meaning from outside of the Compact.

Tarrant further suggests that the drafters of the Red River Compact must have intended its interpretation that any state could reach beyond its borders any time a need for additional water arises. As an example of this argument, Tarrant notes that none of Subbasin 5 extends into Louisiana, but Louisiana is guaranteed a 25% allocation of Subbasin 5 water (Pet. Br. at 31). Surely then, Tarrant argues, the Compact's drafters intended for Louisiana to reach into Texas, Arkansas, and Oklahoma to quench its thirst. *Id.*

But logic and the clear language of the Compact belie Tarrant's interpretation. Because the Red River

flows in a southeasterly direction into Louisiana, Louisiana's allocation of the Subbasin 5 water flows into the State from points north and west. The dynamic nature of running water means that Louisiana need not reach across state lines to acquire its share of the water "originating in" Subbasin 5. RRC, §5.05(b)(1). Rather, Louisiana's use of water "originating in" Subbasin 5 is delivered to it and becomes subject to Louisiana's water usage laws at the State line based on simple principles of hydrodynamics.

Nor is it relevant that Subbasin 5 water that flows into Louisiana becomes Reach V water once it crosses the border (Pet. Br. at 34). Section 5.05 of the Compact was intended to impose certain obligations on upstream states. As long as the water allocated to Louisiana arrives at the State line in quantities sufficient to meet the requirements set forth in Section 5.05, the upstream states' obligations are met, regardless of the classification of the water after it crosses the State line. Similarly, that Louisiana is guaranteed 25% of the water originating in Subbasin 5 is a logical consequence of the reality that Louisiana is the only Signatory State that cannot store Subbasin 5, to the detriment of an upstream State, water in times of high flow. *See* RRC, §5.05(b)(2) (" . . . this requirement shall not be interpreted to require any state to release stored water.").

C. If the Signatory States Intended to Abrogate Their Intrastate Water Rights, They Would Have Stated So Expressly.

Tarrant's argument also requires this Court to read into the Compact non-existent language. As Tarrant correctly notes, this Court's insertion of such language into the Compact is prohibited as "transcend[ing] the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926). Such language would establish a scheme to invade the borders of neighboring states in order for any of the compacting states to satisfy their ever-changing water needs. This language simply does not exist in the Compact. Rather, the Occam's Razor explanation for how Louisiana gets its share of Subbasin 5 water is that the Compact drafters recognized that Louisiana's share would be delivered to its borders naturally, as would be the case with all of the Compacting States' shares. Indeed, contrary to Tarrant's general position in this matter that the Compact's allocation of no more than 25% to each of the states authorizes sovereign invasions, the purpose is precisely what the Compact states: to conserve the resource, to promote interstate comity, and to ensure that minimum flows reach downstream states. RRC, Art. I. Tarrant's strained reading of the Compact ignores this. Several provisions of the Compact, including Sections 2.01 and 2.10(a) and (b), retain the States' regulatory authority over water within their boundaries and nothing in Section 5.05(b)(1) expressly abrogates this authority.

II. THE CLEAR STATEMENT CANON OF CONSTRUCTION SHOULD NOT BE MECHANISTICALLY APPLIED TO INTERSTATE COMPACTS.

Petitioner's argument hinges upon an erroneous assumption that Oklahoma's restrictions are valid only if this Court concludes that the Red River Compact includes an express provision affirmatively authorizing the specific restriction. Petitioner's asserted justification for requiring such a unique specific provision springs from its assumption that (a) the restriction would otherwise violate the dormant Commerce Clause; *and* (b) that to avoid a violation of the dormant Commerce Clause the clear statement canon of construction applies. To begin with, the *assumption* that the "clear statement" canon of construction applies mechanistically to constitutionally-mandated, congressionally-approved compacts is misplaced.

Ironically, Petitioner and those supporting Petitioner would have this Court apply a substantive canon of construction while simultaneously asking that the Court apply general principles of contract interpretation. The two endeavors are quite different, and this Court cautiously has avoided suggesting that general principles of contract interpretation apply. "[A]n interstate compact," after all, "is not just a contract; it is a federal statute enacted by Congress." *Alabama v. North Carolina*, 130 S. Ct. 2295, 2312 (2010). *See Cuyler v. Adams*, 449 U.S. 433, 439 n.7 (1981) (Compact is "law of the Union" and presents a federal question). Compacts, therefore, do not

necessarily have an implied obligation of good faith and fair dealing.[2] The "clear statement" canon reflects a substantive canon this Court *may* employ as but one tool of construction, which "reflect[s] substantive values drawn from the common law, federal statutes, or the United States Constitution."[3] Yet, two principal reasons counsel against applying this substantive canon to the instant interpretative task.

First, the canon's relevance depends upon the questionable *assumption* that, absent the Compact, Oklahoma's actions violate the dormant Commerce Clause. This Court's dormant Commerce Clause jurisprudence has been evolving.[4] In *Greer v. Connecticut*,

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[2] *Id. See also Virginia v. Maryland*, 540 U.S. 56, 66 (2003) ("We interpret a congressionally approved interstate compact '[j]ust as if [we] were addressing a federal statute.'") (quoting *New Jersey v. New York*, 523 U.S. 767, 811 (1998)). And it would be quite remarkable if, as has been suggested by some, that the mistake of fact contract principle could be applied to the Colorado River Compact (70 Cong. Rec. 324 (1928)). *Cf.* John U. Carlson, Alan E. Boles, Jr., *Contrary Views of the Law of the Colorado River: An Examination of Rivalries Between the Upper and Lower Basins*, 32 ROCKY MNT. MIN. L. INST. 21 (1986) (suggesting possible application of contract law doctrine).

[3] William N. Eskridge, Jr., Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595 (1992); *see also* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399 (2010).

[4] *See generally* Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37 (2005-2006); Barry Friedman & Daniel T. Deacon, *A Course Unbroken: the Constitutional Legitimacy of the Dormant Commerce Clause*,

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161 U.S. 519 (1896), and then in *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), the Court permitted states' efforts to limit the export of their natural resources. This changed when the Court invalidated Oklahoma's law embargoing the export of natural gas, *West v. Kan. Natural Gas Co.*, 221 U.S. 229 (1911), and also overruled its earlier cases and struck down the State's prohibition against transporting in-state minnows for sale outside the state. *Hughes v. Oklahoma*, 441 U.S. 322 (1979). *Cf. City of Altus v. Carr*, 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd*, 385 U.S. 35 (1966) (summarily affirming invalidation of Texas law barring interstate water export absent state legislative assent).

Yet, state control of water resources presents unique challenges, particularly with increasingly complex hydrological changes – and this Court's decision in *Sporhase v. Nebraska*, 458 U.S. 941 (1982) does not preclude Oklahoma from responding to these challenges. In *Sporhase*, Nebraska sought to restrict the out-of-state export of groundwater from wells within the state and required a permit for exporting groundwater. Further, Nebraska would issue a permit only if the proposed water withdrawal was reasonable and did not adversely affect the ecosystem or citizens of the state, and then only if the water was being exported to a state that reciprocated and allowed water

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97 VA. L. REV. 1877 (2011); Sam Kalen, *Reawakening the Dormant Commerce Clause in Its First Century*, 13 U. DAYTON L. REV. 417 (1988).

to be imported into Nebraska. The Court accepted the ability of the state to ensure against adverse environmental and other effects on the water transfer but treated the reciprocity provision as an impermissible discrimination against interstate commerce. The Court emphasized that Nebraska had not shown that its reciprocity provision was reasonably tailored to address a valid conservation concern. 458 U.S. at 958 ("If it could be shown that the State as a whole suffers a water shortage, that the intrastate transportation of water from areas of abundance to areas of shortage is feasible regardless of distance, and that the importation of water from adjoining States would roughly compensate for any exportation to those States, then the conservation and preservation purpose might be credibly advanced for the reciprocity provision."). *See also Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976) (involving an impermissible reciprocity requirement).

This Court, therefore, should be cautious before accepting Petitioner's implicit invitation to expand *Sporhase* beyond its narrow conclusion regarding the reciprocity provision. There is little more fundamental to a state's identity than its public trust resources. Professor Craig aptly characterizes the states' regulation of these resources:

> Public trust law, in other words, is very much a species of state common law. Moreover, as with other forms of common law, states have evolved their public trust doctrines in light of the particular histories and

the perceived needs and problems of each state.[5]

The concept that waters are a specific trust resource regulated by individual states is one long recognized by this Court. *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 452-453 (1892). In fact, this Court has noted that, not only are navigable waters state-regulated trust resources, but also that a state might be limited in its ability to abdicate its regulatory obligation over these waters *Id. Cf. Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988). Unlike other possibly traditional articles of commerce, water in many western states is constitutionally treated as a state owned resource or a publicly owned resource for the benefit of the state's citizens.[6]

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[5] Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 53 (2010). This Court, in fact, recently observed that areas subject to the equal footing doctrine may be allocated by state law "subject only to 'the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.'" *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1228 (2012) (quoting *United States v. Oregon*, 295 U.S. 1, 14 (1935)). *See also Massachusetts v. New York*, 271 U.S. 65, 89 (1926) ("[D]ominion over navigable waters, and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged").

[6] *E.g.*, Wyoming Const., Art. VIII, Sec. 1. The Court in *Sporhase* dismissed public ownership as a fiction, apparently in light of water marketing, but the issues involving the transfer and marketing of water are quite complex, and require an acute

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In Louisiana, the Constitution expressly charges the Legislature with protecting the State's waters. *See* La. Const. Art. IX, Sec. 1 ("The natural resources of the state, including air and *water*, and the healthful, scenic, historic, and esthetic quality of the environment *shall be protected, conserved, and replenished* insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy" (emphasis added)). Although Arkansas' Constitution lacks an analogous provision, its public trust obligations towards water are embodied in various statutes and court decisions. *See e.g.*, Ark. Code Ann. §§15-22-201, *et seq.*; Ark. Code Ann. §§15-22-301, *et seq.*; *Anderson v. Reames*, 161 S.W.2d 957, 960-961 (Ark. 1942).

Indeed, Louisiana water law highlights why states should be afforded ample latitude to develop programs tailored to their unique hydrological needs. This fundamental natural resource has been recognized, since the early days of statehood, as a trust resource that the State is obligated to manage in the best interests of the people. In conjunction with Louisiana's Public Trust Doctrine, Louisiana's Civil Code identifies running water as a public trust resource. La. C.C. Art. 450 specifically states that "[p]ublic things that belong to the state are such as running waters, the waters and bottoms of natural

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appreciation for the effects of out-of-basin transfers, the impact and expectation of return flows, as well as a host of other issues.

navigable water bodies, the territorial sea, and the seashore." This concept in Louisiana law is derived directly from Roman roots. *See* INSTITUTES OF JUSTINIAN, Book II, Title I(1) (J.B. Moyle, trans., Oxford, 1911). Thus, the conceptual roots of a sovereign controlling its waters are ancient. While this provision does not imbue the State with any regulatory authority over the use of "running waters," it does vest ownership of the resource in the State as the trustee for its citizens.[7] And it is a resource that in Louisiana alone, like in many of the nation's western states, has been the object of more than a century of legislating.

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[7] Early versions of the Louisiana Civil Code provided for various riparian water rights through predecessors to current Code Articles 456, 657, and 658, by dictating how riparian landowners could use waters running through or adjacent to their property. The legal concepts from these Code articles were present in Louisiana at least as early as the Civil Code of 1870. In 1910, the Louisiana Legislature, through La. R.S. 9:1101, further clarified the public trust nature of the waters in the State by stating, in part, that, "[t]here shall never be any charge assessed against any person for the use of the waters of the state for municipal, industrial, agricultural or domestic purposes." Louisiana's regulation of its water resources has continued to the present day. As part of a comprehensive effort to ensure the protection of this resource from overuse, in 2010, Louisiana's Legislature passed Act 955 (as amended and reauthorized by Acts 2012, No. 261). This law sets forth a scheme for the regulation of consumptive uses of the State's surface waters and the jurisprudence requires that environmental impacts analyses of any such uses be undertaken. La. R.S. 30:961-963; *Save Ourselves, Inc. v. Louisiana Environmental Control Com'n*, 452 So.2d 1152 (La. 1984). Consequently, the fundamental principle that water is a public trust resource carries continued resonance today.

Consequently, pernicious and unnecessary consequences could flow from bootstrapping into the interpretative task a mechanistic application and expansion of *Sporhase* to Oklahoma's quite different circumstances and restrictions on exports. *See generally* Christine A. Klein, *The Dormant Commerce Clause and Water Export: Toward a New Analytical Paradigm*, 35 HARV. ENVTL. L. REV. 131, 137-139 (2011) (addressing *Sporhase* and the complexities of state water law); *see also* Davis & Pappas, *supra*.

Second, the canon undoubtedly is a powerful interpretative tool that should be used only when the norms it seeks to protect are at risk, and those norms are not present when the States and Congress cooperatively exercise authority under Article 1, Section 10. The canon often serves as a surrogate for protecting principles of federalism.[8] Justice Kennedy aptly noted that the clear statement rule is an interpretive

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[8] Eskridge & Frickey, *Clear Statement Rules as Constitutional Lawmaking*, *supra*, at 612. *See Nixon v. Missouri Municipal League*, 541 U.S. 125, 140 (2004) ("federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires."). *E.g.*, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (whether act unmistakably abrogates states' Eleventh Amendment immunity); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995) (whether an area traditionally regulated by state and whether to apply federal law); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (plain statement rule when possible intrusion into state governmental functions).

device that "facilitate[s] a dialogue between Congress and the Court." *Boumediene v. Bush*, 553 U.S. 723, 738 (2008). The Court added:

> If the Court invokes a clear statement rule to advise that certain statutory interpretations are favored in order to avoid constitutional difficulties, Congress can make an informed legislative choice either to amend the statute or to retain its existing text. If Congress amends, its intent must be respected even if a difficult constitutional question is presented.

553 U.S. at 738. The canon has been employed, for instance, to protect traditional state interests against possibly unintended federal intrusion. *Rapanos v. United States*, 547 U.S. 715, 738 (2006). *See also* Felix Frankfurter, *Some Reflections on the Readings of Statutes*, 47 COLUM. L. REV. 527, 539-540 (1947) (quoted in *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994)). This Court's longstanding presumption against preemption is similarly designed to ensure that congressional statutes are not construed so broadly as to supplant state legislation absent sufficient evidence of congressional intent to do so.[9] Conversely, the Court has sought to protect the values embedded in

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[9] *See Reigel v. Medtronic*, 552 U.S. 312, 334-335 (2008) (Ginsberg, J., dissenting); *Bates v. Dow Agrosciences, L.L.C.*, 544 U.S. 431, 449 (2005); *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 788-789 (2000) (Ginsburg, J., concurring) (concluding that no clear statement exists subjecting states to *qui tam* suits by private parties).

the dormant Commerce Clause by employing a clear statement canon in instances *when Congress has exercised its Article 1, Section 8 powers.*[10] But petitioner conflates Congress' exercise of these powers with its exercise of the unique joint federal/state dynamic permitted *by Article 1, Section 10.*[11]

The cooperative federal/state effort that occurs when acting pursuant to Article 1, Section 10 not only does not implicate the norms the canon is designed to protect, the use of the canon in circumstances involving water compacts would turn the interpretative exercise on its head. After all, in the words of one of the nation's foremost pioneers in western water law, Dean Trelease, "[e]conomic protection is the very purpose of the compact." Frank J. Trelease, *State Water and State Lines: Commerce in Water Resources*, 56 U. COLO. L. REV. 347, 349 (1985).[12] Indeed, the Court

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[10] *White v. Mass. Council of Construction Employers, Inc.*, 460 U.S. 204, 213 (1983) ("Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause. . . . "); *see also Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982) ("when Congress has not 'expressly stated its intent and policy' to sustain state legislation") (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427, 431 (1946)).

[11] *See generally* Dave Frohnmayer, *The Compact Clause, The Appointments Clause and the New Cooperative Federalism: The Accommodation of Constitutional Values in the Northwest Power Act*, 17 ENVTL. L. 767 (1987) (former state Attorney General for Oregon discussing how the exercise of authority under Compact Clause reflects efforts in cooperative federalism).

[12] The early development of the Compact Clause suggests it serves as Congress' ability to participate in any effort by states

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in *Granholm v. Heald*, 544 U.S. 460, 472-473 (2005), noted that the dormant Commerce Clause avoids forcing states to negotiate with one another "regarding favored or disfavored status for their own citizens." The Compact Clause serves precisely that negotiation function. The same is true for the surrounding clauses in Article 1, Section 10, which involve state activities that, absent congressional assent, run afoul of the authorities granted to Congress in Article 1, Section 8: states impliedly are precluded from engaging in certain activities with foreign nations under Article 1, Section 8, while Article 1, Section 10 affords Congress and states the express authority to allow states to enter into agreements with foreign nations.[13]

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that might otherwise interfere with Congress's powers or increase the political powers of the signatory states. Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 762 (2010). *See also* Abraham C. Wenfeld, *Comment: What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts,"* 3 U. CHI. L. REV. 543 (1935-1936) (exploring the meaning of the terms). *E.g.*, *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976) ("The application of the Compact Clause is limited to agreements that are '[d]irected to the formation of any combination tending to the increase of political power in the states, which may encroach or interfere with the just supremacy of the United States.'") (quoting *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893)). *See also U.S. Steel v. Multistate Tax Com'n*, 434 U.S. 452, 473 (1978) ("enhances state power *quoad* the National Government").

[13] *See* Hollis, *Unpacking the Compact Clause*, *supra*, at 785 (discussing states' ability to enter into foreign agreements and whether possibly limited by exclusive authority in the federal government); *see also* Duncan B. Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071 (2008) (discussing foreign agreement involving water transfers). *E.g.*, An Act to Authorize the

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Also, interstate compacts occur in a variety of areas, see David E. Engdahl, *Interstate Urban Areas and Interstate "Agreements" and "Compacts": Unclear Possibilities*, 58 GEO. L.J. 799, 800-801 (1970), and mechanistically applying substantive canons when interpreting the range of compacts and correspondingly potential constitutional issues could easily lead to unintended consequences. *See* Frohnmayer, *The Compact Clause, supra* (addressing Appointments Clause issue for Northwest Power Planning Council).

When in a compact, therefore, one state seeks to ensure that it can access the water resources in another state, it need not, as Petitioner suggests, include an explicit statement about the dormant Commerce Clause, but rather it includes a specific clause in the compact allowing it to do so. That is precisely what the parties did in the Colorado River Compact, when they included specific provisions allowing a state the ability to attempt to secure its allocation from within the borders of another state. Articles 11, 12, Upper Colorado River Basin Compact (Pub. L. No. 81-37, 63 Stat. 31 (1949)). Such explicit language is

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Construction and Maintenance of a Bridge Across the Niagara River, 16 Stat. 173 (June 30, 1870) (approving International Bridge Compact); *Canada Southern Ry. Co. v. International Bridge Co.*, 8 F. 190, 192 (D.C. N.Y. 1881) ("It was an inherent condition to the complete enjoyment of the grant . . . that congress should sanction the undertaking proposed, as congress was a necessary party to any compact which involved the cession of the sovereignty of the United States over that part of the Niagara river [which,] . . . is a public, navigable water, and under the power to regulate commerce. . . .").

absent from the Red River Compact and should not be supplied by implication.

CONCLUSION

This Court, therefore, should affirm the Tenth Circuit's decision in this matter, and uphold the clear language of the Red River Compact and its well-settled understanding by all the signatory states except Texas.

Respectfully submitted,

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AMICUS CURIAE BRIEF

AND
BRIEFS

No. 11-889

FEB 2 8 2013

IN THE

Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,
Petitioner,

v.

RUDOLF JOHN HERRMANN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF OLEN PAUL MATTHEWS AND MICHAEL PEASE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

Olen Paul Matthews, Ph.D., J.D., is a Professor of Geography at the University of New Mexico. He has taught and written about water management for many years. His research expertise includes transboundary natural resource conflicts. Michael Pease, Ph.D., is an Assistant Professor of Geography at Central Washington University. He also teaches classes in water management. His research expertise includes a broad spectrum of water management issues. Together they are the co-authors of *The Commerce Clause, Interstate Compacts, and Marketing Water Across State Boundaries*, 46 Natural Resources Journal 601 (2006). Both have an academic interest in this case but no other interest.[1]

SUMMARY OF THE ARGUMENT

The Commerce Clause, U.S. Const., art. I, § 8, cl 3, creates a "federal free trade unit... protecting interstate movement of goods against local burdens and repressions." *H. P. Hood v. DuMond*, 336 U.S. 525, 538-39 (1949). State statutes that discriminate against out-of-state interests thus impair free trade. The Oklahoma statutes in question are clearly discriminatory, and would violate the Commerce Clause absent congressional consent. Such consent must be "expressly stated," *Sporhase v. Nebraska*, 458 U.S. 941, 959-60 (1982), "unambiguous," *Maine v. Taylor*,

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici*, their counsel or the Fort Worth (TX) Chamber of Commerce made any monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

477 U.S. 131, 139 (1986), and "unmistakably clear," and must also reflect that Congress "affirmatively contemplate[d] otherwise invalid state legislation," *South-Central Timber Devel., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984).

The Red River Compact's boilerplate provision deferring to state water law does not pass this test, and was clearly rejected as such in *Sporhase*. The compact language simply recognizes state jurisdiction over water rights. Congress often defers to state law on water rights while retaining broad power over commerce and navigation. In addition, the compact clearly grants "equal rights" to the "runoff" from a specific segment of the river. "Equal rights" means the compact intends that water be shared in some way. "Runoff" is defined by an entire watershed or subbasin, not just the flows originating on one side of it. Because the Texas boundary at issue in this case ends on the south bank of the Red River, the only way Petitioner can obtain its "share" of "runoff" is to acquire a water right within Oklahoma's boundaries under Oklahoma law. Oklahoma's discriminatory statutes prevent Texas entities like Petitioner from obtaining rights to compact waters explicitly allocated to them.

We first provide an historical perspective on the transboundary conflicts that plague water management. We then place the controversy in this case in that historical context. We finally argue that the Tenth Circuit's decision upholding Oklahoma's discriminatory statutes fails to follow this Court's precedents and would substantially upset the balance between federal and state law, creating havoc for water managers.

ARGUMENT

Water management in this country has a long and complex history. The discussion below covers three aspects of water policy evolution in order to put the current conflict in context. First, we explain that States and the federal government share jurisdiction over water resources, creating a complex mix that often leads to conflicts. Language in 37 statutes and interstate compacts deferring to state water allocation laws proves this point. See *Sporhase*, 458 U.S. at 959. These statutes and compacts grant States a limited role within an overall management structure. Second, when jurisdictional conflicts arise between States three methods exist for their resolution—equitable apportionment, interstate compacts, and congressional apportionment. This case involves a compact, but the other methods help explain the role compacts play. Third, resolution of these conflicts takes place within the constraints imposed by the Commerce Clause, U.S. Const., art. I, § 8, cl 3. Since *Sporhase*, jurisdictional conflicts must address those concerns.

I. SHARED FEDERAL AND STATE JURISDICTION OVER WATER

Federal water management initiatives before 1900 were limited in scope. Clearly the federal government had jurisdiction over interstate commerce, including navigation. *Gibbons v. Ogden*, 22 U.S. 1 (1824). During this country's first century many goods were shipped by water, and navigation was clearly commerce. Because commerce is a constitutionally designated power, federal laws on interstate commerce were "supreme" over conflicting state laws.

Federal expenditures on navigation improvements were common in the early 1800s and became a regular part of the federal budget especially after 1870. For example, the Rivers and Harbors Act of 1879, 21 Stat. 37, created the Mississippi River Commission to improve navigation on the river, and the Rivers and Harbors Act of 1899, 33 Stat. 403, prevented excavations or filling that would affect the navigable capacity of navigable waters and also prohibited the discharge of "refuse" into navigable waters without a permit.

Even though navigation was clearly a matter of federal regulation during the 1800s, federal authority to build flood control levees and reservoirs, drain wetlands, or fund reclamation projects was questioned. During this period indirect means were used to accomplish these purposes. See generally Armstrong, Ellis L., Michael C. Robinson, Suellen M. Hoy, *History of Public Works in the United States 1776-1976* (Amer. Public Works Assoc. 1976). Levees and reservoirs were built to improve navigation, but they also prevented floods. Since States could not afford to drain swamps and wetlands, the federal government granted them public lands they could sell to finance such projects. See, *e.g.*, the Swamp Land Acts of 1849 (9 Stat. 352), 1850 (9 Stat. 520), and 1860 (12 Stat 3). By the end of the 19th century federal power had been extended to tributaries of navigable waters and other sources affecting a water body's "navigable capacity." *United States. v. Rio Grande Dam & Irrig Co.* 174 U.S. 690 (1899). As western States developed laws allowing streams and rivers to be depleted (or even dewatered) for irrigation, state "irrigation" could conflict with federal "navigation".

After 1900 questions concerning federal authority to finance, regulate, or require permits for water projects were largely dispelled. The Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388, the General Dam Act of 1906, 34 Stat. 386, the Federal Water Power Act of 1920, 41 Stat. 1063, the 1928 Flood Control Act, 45 Stat. 534, the Federal Power Act of 1935, 49 Stat. 847, 16 USC §§ 791a *et seq.*, and the Flood Control Act of 1936, 49 Stat. 1570, are examples of Congressional action designed to control different aspects of water use. More recently, federal environmental statutes such as the Clean Water Act (33 U.S.C. 1251 *et seq.*), the Safe Drinking Water Act (42 U.S.C. 300f *et seq.*), and the Endangered Species Act (16 U.S.C. 1531 *et seq.*), influence water management.

As those statutes illustrate, federal power over water is substantial. Nonetheless, States also have powers that they exercise concurrently with the federal government. States generally define water rights. See Beck, Robert E. and Amy K. Kelly, *The Legal Regimes*, § 4.02, in Water and Water Rights (Lexis Nexis 2012). But State-defined water rights are still subject to the superior federal power over commerce and navigation. (*Id.* §4.03) Even though States defined water rights in the 1800s, most water management was conducted at the local level, as municipalities, local districts and the private sector supplied water, built levees, drained swamps, built canals, and removed waste water. When projects were too expensive for local governments or the private sector, States financed them. This was sometimes successful, but not always. See Armstrong *et al.*, *supra* at 26; Wallis, John Joseph, *Constitutions, Corporations, And Corruption: American States And Constitutional Change, 1842 – 1852,* 65 J. Econ. Hist. 211 (2005).

In the arid West the demand for irrigation was substantial, but frontier States could not afford such projects, and the few that tried to mount them failed. See Pisani, D.J., *To Reclaim a Divided West: Water, Law, and Public Policy, 1848-1902*, at 487 (U. of New Mexico Press 1992). State lobbying resulted in the passage of the Carey Act, 43 Stat. 2610 (1894), under which federal lands were donated to States to help defray costs. When this failed western States became advocates of a federal reclamation law. The result was the Reclamation Act of 1902, Pub. L. 57-161, 32 Stat. 388.

By the time the Reclamation Act was passed western States had evolved a system for establishing water rights that was substantially different from that in the East.[2] The western Appropriation Doctrine was originally recognized in California, see *Irwin v. Phillips*, 5 Cal. 140 (1855), and later adopted by other western States. It severed water rights from land ownership, allowed water to be diverted and used in another watershed, and allowed water rights to be sold.

Although the doctrine was applied unevenly in the West, it ultimately gained broad acceptance and was well established by 1902. Many States adopted constitutional or statutory provisions recognizing it. For example, Article 14 of the California Constitution (adopted in 1879) directed that water be regulated and controlled by the State. The Colorado Constitu-

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[2] The riparian rights doctrine used in the East evolved in common law to resolve disputes between riparian landowners who share common rights in a river. Riparian rights were originally used in the West as well, but they were incompatible with irrigation needs and the Reclamation Service was opposed to them.

tion, at Article 16, § 5 (1876), declared unappropriated water to be the "property of the public." These provisions significantly departed from the practices in the East, where water rights resided in riparian land owners. Not until the Wyoming constitution and water code (enacted in 1890) did comprehensive water laws emerge. Beck, Robert E. and Owen L. Anderson, Introduction and Background, Ch. 11, § 11.04(b), in *Water and Water Rights supra*. In the Wyoming constitution the State claimed ownership of all the water in the State. Wyoming Const., art 8, § 1. Other state codes evolved in time. Although States claimed water "ownership" for themselves or "the public," they created rules for establishing private rights. These "use" (usufructory) rights are "property" and can be sold under defined circumstances, essentially making water a commodity.

The variations in States' approaches and failures to systematically adjudicate existing rights made it difficult to implement the Reclamation Act. Fear that speculators would claim water rights in areas prior to a federal project led to a push for reform. Parts of Wyoming's comprehensive approach were adopted in some western States. Others adopted the Bien Code System, a model code developed around 1903 by the Reclamation Service because existing state laws were unclear and many water rights went unadjudicated. See Hutchins, W.A., J.P. DeBraal and H.H. Ellis, Water Rights Laws in the Nineteen Western States, at 458-59 (U.S. Dept. of Agr., Natural Resource Economics Div. 1974). These unadjudicated rights created chaos for large projects, and the Reclamation Service encouraged States to adopt comprehensive codes before it approved and funded projects. In the Reclamation Act the deference to state law meant deference to these water codes.

Federal influence over navigation and commerce thus persisted.

States were also motivated to adopt comprehensive codes by the potential for the assertion of federal authority over water rights. As the owner of the public domain, the federal government had a strong claim to water "ownership." See Pisani, *supra* at 64. A federal Irrigation Survey had identified 147 reservoir sites by 1890, *id.* at 163, poising the federal government to become a player in western irrigation. In spite of concerns over federal usurpation, western States pushed for a federal role because they could not afford to go on their own.

The debates leading up to passage of the Reclamation Act of 1902 show there was substantial disagreement over the role of the federal government. The original bill favored western interests by giving the States almost complete power and limiting the federal role to financing. This met with a tepid reception from eastern Senators and Congressmen who favored an expanded federal role. Revisions to the bill were insufficient to move them. Only a threat by President Theodore Roosevelt to veto a pending rivers and harbors bill that largely benefited eastern interests brought the Reclamation Act to a vote. See Pisani, *supra* at 319.

Although the Reclamation Act contains many provisions related to federal responsibility, the key provision was Section 8 (codified at 43 U.S.C. § 383), which recognized that state laws must be honored:

> [n]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or

> distribution of water used in irrigation, or any vested right acquired thereunder...

43 U.S.C. § 383. This section makes it clear that both state and federal rights are recognized:

> [T]he Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of *the Federal Government* or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

Id. (emphasis added). Other federal water management statutes also allow States to establish water rights, although congressionally mandated purposes must still be accomplished.

When the Reclamation Act was passed the federal government did not have a system for establishing water rights. States had stepped into this void and were actively granting water rights in 1902 even though their systems were still a bit chaotic. Western Congressmen who supported the Act made sure this power remained with the States. They could established property rights, but those rights could not interfere with federal power over commerce and navigation.

Another example is the Federal Water Power Act, 41 Stat. 1063 (1920). It disavowed any intent to "affect or interfere in any way with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right therein," 16 U.S.C. § 821. Even with this deference States cannot enact provisions that conflict with the Act's requirements. See *First Iowa Hydro-Electric*

Coop. v. FPC, 328 U.S. 152 (1946). Nor can States impose higher minimum stream flow requirements than those allowed by a federal license granted under the Act. Deference to state law does not give States a "veto of the project." *California v. FERC*, 495 U.S. 490, 507 (1990).

As the federal presence in other aspects of water management grew, deference to state laws establishing water rights was provided for in many other federal statutes. But this was a very limited form of deference; the substantial federal presence in water regulation would be untenable if States had the power to veto federal laws. In addition, state laws cannot impose an undue burden on interstate commerce. Federal "deference" to state laws allowing individuals to establish or sell water rights does not imply that the federal government has given up its powers over water.

II. WATER ALLOCATION BETWEEN STATES

John Wesley Powell recognized that dividing watersheds with state boundaries would create water management problems. Powell, John Wesley, *A Report on the Lands of the Arid Region of the United States*, at 31 (Gov't Printing Ofc. 1878). His recommendations were ignored, and States have been at odds ever since. Upstream States can take water from a stream before it reaches a downstream State, potentially causing downstream harm. When States share a common water boundary, they must also share in water allocation. The disputes that result, among competing States and between States and the federal government, raise fundamental questions about shared jurisdiction over water. Three methods are used in resolving these conflicts: equitable

apportionment by the Supreme Court; congressional apportionment; and interstate compacts negotiated between the States and approved by Congress. Although this case concerns a compact, some background on the other methods will help explain the context within which compacts are negotiated.

The first interstate dispute arose between Kansas and Colorado over the Arkansas River. Upstream irrigators in Colorado withdrew water from the river prior to settlements in Kansas. Once settlers moved into that part of Kansas they began to demand a share of the water that was being diverted upstream. Kansas sued Colorado in the Supreme Court under the Court's original jurisdiction. *Kansas v. Colorado*, 185 U.S. 125 (1902). In a later decision, the Court announced that "equitable apportionment" was the standard to be used in resolving interstate water conflicts. *Kansas v. Colorado*, 206 U.S. 46, 47 (1907). Although the standard was established, no water allocation was made because the Court found Kansas was not being harmed. *Id* at 107-108. The Court was reluctant to harm an existing economy by reducing their water supply just so residents in another State could use this same water to improve their own economy. See *id.* at 118; see also *Colorado v. New Mexico*, 459 U.S. 176, 184 (1982). Balancing the harms and benefits to each competing State is part of an equitable apportionment, but this does not mean the Court will rebalance the harm and benefit if there is no net gain. The balancing process makes it hard to show actual harm. As a result, the Court has apportioned water in only three cases: *Wyoming v. Colorado*, 259 U.S. 419 (1922); *New Jersey v. New York*, 283 U.S. 336 (1931); *Nebraska v. Wyoming*, 325 U.S. 589 (1945).

The outcome of an equitable apportionment has a degree of uncertainty because the standard is flexible. In the first case where an apportionment actually occurred, *Wyoming v. Colorado*, 259 U.S. 419 (1922), both States followed the appropriation doctrine's temporal priority system. The Court used the priorities of each State's water rights and combined them to allocate the river's average annual dependable flow. Using existing state law seemed equitable, since both States had water rights based on prior appropriation. But in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), the Court developed an extensive list of variables that was "merely illustrative, not an exhaustive catalogue," *id.* at 618, making the process open-ended. Ultimately the Court allocated a percentage of the natural river flow to each State.

Because of the uncertainty preceding an equitable apportionment, the threat of a Supreme Court allocation may be enough to move States to negotiate an interstate compact. The Court prefers this outcome, and has encouraged it. See, *e.g.*, *Texas v. New Mexico*, 462 U.S. 554, 565 (1983). Three points need to be made about equitable apportionment. First, the outcome is uncertain because equities are decided on a case-by-case basis. Second, and as the Court has suggested, equities can change over time. If equities can change, should a water allocation ever be permanent?[3] Third, the fact that a river originates within a

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[3] In *Kansas v. Colorado*, 206 U.S. 46, 117-18 (1907), the Court's decision was "without prejudice to the right of the plaintiff to institute new proceedings whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two States resulting from the flow of the river."

State does not automatically give the State or its residents a right to a share of that river's water. *Colorado v. New Mexico*, 467 U.S. 310, 323 (1984).

The second method of allocation, congressional apportionment, has only been used twice, and only after other measures failed. The Boulder Canyon Project Act of 1928, 45 Stat. 1057, apportioned water in the lower Colorado River, while the Truckee-Carson-Pyramid Lake Water Rights Settlement Act, 104 Stat. 3289 (1990), apportioned waters of Lake Tahoe and the Truckee and Carson Rivers. As to the former, on the lower Colorado River it was unclear an apportionment had taken place until the Court decided *Arizona v. Colorado*, 373 U.S. 546 (1963). The Colorado River Compact of 1922, 45 Stat. 1057, divided that river's upper and lower basin, but Arizona refused to ratify it. Without ratification Hoover Dam could not be constructed. To resolve this Congress passed the Boulder Canyon Project Act, allowing the compact to take effect if six of the seven participating States ratified it. The Act also authorized the Secretary of the Interior to enter into delivery contracts with specific allocations between each of the lower basin States. Arizona's recalcitrance thus led to a federal solution. Similarly, California and Nevada tried for 20 years to get congressional approval of a compact for the Truckee and Carson Rivers; because the proposed compact ignored federal interests and Indian water claims, Congress would not approve it. In 1990 Congress specifically apportioned the waters in question in the Truckee-Carson-Pyramid Lake Water Rights Settlement Act, 104 Stat. 3289. Although federal allocation has some advantages, state interests still prefer negotiated interstate compacts.

Interstate compacts are negotiated between interested States and ratified by Congress, making them federal law. Twenty-two water compacts have been approved in the West.[4] The first compacts were drafted and approved in the 1920s: the South Platte River Compact, 44 Stat. 195 (1926), the La Plata River Compact, 43 Stat. 796 (1925), and the Colorado River Compact, 45 Stat. 1057 (1928). These were approved soon after the Court apportioned water on the Laramie River. Subsequent compacts developed a variety of ways for allocating water.

Even though compacts are the most frequently used method for interstate allocation, they have serious flaws. Compact negotiation is generally a compromise process, and the resulting agreements are frequently ineffective. This has been especially true with western compacts, which tend to have a narrow focus. In western compacts the compact commissions have limited authority (only two-thirds even have them), funding is weak or non-existent, groundwater is frequently excluded, water quality (intrinsically linked with water quantity) is ignored, enforcement mechanisms are absent or ineffective, few address how they may be amended, and federal interests are omitted. See McCormick, Z. L., *Interstate Water Allocation Compacts In The Western United States – Some Suggestions,* 30 J. of the Amer. Water Resources Assoc. 385 (1994); McCormick, Z. L., The Use of Interstate Compacts To Resolve Transboundary Water Allocation Issues, Doctoral Dissertation, Okla. St. Univ. (1994). In addition, unanimous consent of all parties is often required before any action is taken.

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[4] Some multipurpose compacts have been negotiated in the East but are not included in this discussion.

Western water compacts also do not allow comprehensive watershed management, an oft-stated goal of water managers. These compacts are negotiated for a limited purpose and are not flexible in resolving subsequent problems. For example, ignoring groundwater that is hydrologically connected to a compact river has caused many problems.[5] Even after compacts are enacted their interpretation is frequently the subject of litigation. In order to have strong and effective compacts, States must give up some authority. But States do not like "intrusions" on their sovereignty and generally resist such limitations. The result is weak compacts.

As most compacts make clear, States want to retain authority over water. Compacts typically include language like that in the Red River Compact, 94 Stat. 3305 (1980). Section 2.10 provides that "[n]othing in the Compact shall be deemed to: (a) interfere with or impair the right or power of any signatory State to regulate within its boundaries the appropriation, use and control of water or quality of water...." This means new appropriations or transfers of existing rights must comply with the water law of the State of origin. This language is virtually identical to the language in the Reclamation Act and the Federal Power Act discussed above. It does not grant States unlimited power to regulate water and certainly does not authorize them to infringe on commerce.

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[5] For example, on the Pecos River groundwater pumping caused depletion in surface water supplies, leading to a shortfall in New Mexico's water delivery to Texas. See *Texas v. New Mexico*, 462 U.S. 554 (1983). A similar situation occurred on the Arkansas River. See *Kansas v. Colorado*, 514 U.S. 673 (1995).

Compacts are contracts. *Montana v. Wyoming*, 131 S. Ct. 1765, 1770 (2011). They also require congressional approval, making them federal law. States could not enforce compacts unless they were federal law. But does the mere fact of congressional approval elevate a compact to a showing of congressional consent to burdening interstate commerce? Congress did not negotiate the compact and most western allocation compacts ignore federal interests. If the federal government is not a party to the compact, how can something as important as consent to a burden on interstate commerce be read into it?[6]

III. THE COMMERCE CLAUSE

The first Supreme Court decision interpreting the Commerce Clause restricted a State's power to limit commercial competition; the state law had prevented a federally licensed ship from docking in New York harbor. *Gibbons v. Ogden*, 22 U.S. 1 (1924). Subsequent decisions used a variety of tests to describe the limits of state power. States could regulate local commerce (*Gillman v. Philadelphia*, 70 U.S. 713 (1865)) but not national commerce (*Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U.S. 204 (1894)). They could regulate commerce using their police power, but not if the regulation infringed on something that was national in scope. *Western Union Telegraph Co. v. Pendleton*, 122 U.S. 347 (1887). Although many discriminatory state statutes were

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[6] A compelling argument has been made that states can unilaterally withdraw from a compact. See Grant, D. L, *Interstate Water Allocation Compacts: When The Virtue Of Permanence Becomes The Vice of Inflexibility*, 74 U. Colo. L. Rev. 105 (2003). If this is true, how can the federal government be bound?

challenged during this early period, they were usually evaluated under the local versus national criteria. Import bans were a common problem and were routinely struck down, see, *e.g.*, *Railroad Co. v. Husen*, 95 U.S. 465 (1877). After *Guy v. Baltimore*, 100 U.S. 434 (1879), discrimination on its own was sufficient to invalidate state legislation, although other tests continued to be used. Even state statutes that were not facially discriminatory, but had a discriminatory impact, were struck down. *Minnesota v. Barber*, 136 U.S. 313 (1890). Import and export bans were particularly hard to justify. See *Leisy v. Hardin*, 135 U.S. 100 (1890).

Two decisions seemed to create an exception based on "state ownership". In *Geer v. Connecticut*, 161 U.S. 519 (1896), a state statute banning the export of legally killed game birds was upheld. The game birds were considered to be the property of the State held in trust for the people. 161 U.S. at 529. A little over a decade later a ban on water exports was justified using this same theory. *Hudson Cty. Water Co. v. McCarter*, 209 U.S. 349 (1908). These two decisions were used as justifications for export bans in western States where water was claimed to be "owned" in trust for the people of the State. This "state ownership" doctrine was soon limited, and eventually rejected. In *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928), Louisiana claimed ownership of shrimp under the theory that had been advanced in *Geer*. The State required that the heads and shells be removed from shrimp before export. But the Court ruled that Louisiana's requirement was discriminatory because state ownership ended once the shrimp were captured (276 U.S. 12). State ownership was eventually called a legal fiction, and this exception to export bans ended for both wildlife (*Hughes v.*

Oklahoma, 441 U.S. 322 (1979)) and water (*Sporhase v. Nebraska*, 458 U.S. 941 (1982)). "State ownership" will be discussed in greater detail below.

Although discrimination continued to be used as a constitutional test, other tests were used as well. State statutes were unconstitutional if they had a "direct" impact on commerce, but not if the impact was "indirect or incidental." *Munn v. Illinois*, 94 U.S. 113 (1876). States were only allowed to directly interfere with commerce if there was congressional consent. *Brennan v. Titusville,* 153 U.S. 289 (1894). In time the "free flow" of commerce or "barriers" to commerce became additional "tools" for evaluating constitutionality. See, *e.g., South Carolina v. Barnwell,* 303 U.S. 177 (1938); *Edwards v. California,* 314 U.S. 160 (1941). A balancing approach was used in *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). Through all this the idea that the Commerce Clause created a common market within the United States was in the background but not always clearly enunciated. *H. P. Hood v. DuMond*, 336 U.S. 525 (1949), clearly states this principle. Local businesses should not be protected from competition. State statutes should not discriminate against out-of-state commerce. Protectionist barriers to commerce should not be erected. Goods and services should move freely across state boundaries. "Free trade" within the United States should not be impaired.

In time a two-part test developed See *Pike v. Bruce Church*, 397 U.S. 137 (1970). Facially discriminatory statutes are strictly scrutinized. They are upheld only if: 1. a legitimate local interest exists that is unrelated to the State's economic well-being, and 2. nondiscriminatory alternatives do not exist (at 142). Few state statutes survive this strict scrutiny, but

they can, see *Maine v. Taylor* 477 U.S. 131 (1986). For state statutes that are not facially discriminatory but have a discriminatory impact, a balancing test is used. "Evenhanded" and "legitimate" local purposes are balanced against impacts that are not "incidental" but are "excessive" and "unduly" burden interstate commerce.

Two exceptions developed. One is a state interest exception. The second exception is congressional consent. *Sporhase* addresses both the Commerce Clause and the two exceptions. Several prior decisions are important to understanding the Court's reasoning in *Sporhase*. Bans on the import or export of articles of commerce are facially discriminatory and receive the Court's strictest scrutiny. But in order for this to apply, the state statute must apply to an article of commerce. For natural resources that are commonly sold in an interstate market this is a relatively easy determination. Thus a ban on exporting natural gas from Oklahoma was unconstitutional (*West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911)), as was a West Virginia statute granting its citizens a preference in purchasing natural gas (*Pennsylvania v. West Virginia* 262 U.S. 553 (1923)). In *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), a New Jersey ban on garbage importation was struck down because the garbage disposal facility was considered an article of commerce. State ownership of wildlife provided the basis for an Oklahoma statute banning the export of minnows, following the logic of *Geer*, but in *Hughes v. Oklahoma*, 441 U.S. 322 (1979), public/state ownership of wildlife was rejected as "'a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'" 441 U.S. at 334 (quoting *Toomer v. Whitsell*, 334 U.S. 385, 402

(1948)). The Oklahoma export ban was thus an unconstitutional restriction on commerce.

Although the Court did not necessarily adopt the reasoning of the three-judge court in *City of Altus v. Carr* when it summarily affirmed it (see 255 F.Supp. 828 (WD Tex.), *aff'd* 385 U.S. 35 (1966)), it did so when it decided *Sporhase*. At issue in *Altus* was a Texas statute prohibiting groundwater export unless it was approved by the Texas legislature. Part of Texas' argument was groundwater was not an article of commerce, as *Geer* suggested. But in Texas groundwater is considered to be the personal property of the overlying land owners who are free to sell what they pump. The ability to sell the water clearly made it an article of commerce, and the Texas statute was an impermissible burden on commerce. *Altus*, 255 F. Supp. at 830.

In *Sporhase* three questions were answered: 1. Is groundwater an article of commerce? 2. Does the Nebraska statute impose an impermissible burden on commerce? and 3. Has Congress consented to what would otherwise be an unconstitutional statute? In answering the first question the Court confirmed the reasoning in *Altus* even though Nebraska landowners did not absolutely own groundwater as landowners did in Texas. In Nebraska the State claimed groundwater ownership. Groundwater transfers were allowed within the State, and municipalities were allowed to charge a price for delivery. The Court concluded state ownership was a legal fiction and groundwater was an article of commerce. *Sporhase*, 458 U.S. at 959-960. Attempts to distinguish this as a groundwater case ignore the similarities state surface water laws contain. Western States allow the transfer and sale of surface waters under statutory

criteria. These statutes cannot discriminate against out-of-state interests as they too fall under the Commerce Clause.

In answering the second question the *Sporhase* Court applied the test from *Pike v. Bruce Church*. If a state statute:

> "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree."

Sporhase, 458 U.S. at 954, quoting *Pike*, 397 U.S. at 142).

Nebraska's interest in conserving and preserving scarce water resources was a legitimate and important local purpose, but the statute also contained a discriminatory reciprocity provision. This provision would only allow exports to States that did not ban exports. In this case Colorado had a ban on exports; thus applications made in Nebraska to export water to Colorado would be denied. This provision was considered facially discriminatory requiring the strictest scrutiny.

> For there is no evidence that this restriction is narrowly tailored to the conservation and preservation rationale. Even though the supply of water in a particular well may be abundant, or perhaps even excessive, and even though the most beneficial use of that water might be in another State, such water may not be shipped

> into a neighboring State that does not permit its water to be used in Nebraska.

Sporhase, 458 U.S. at 957-58.

Even facially discriminatory legislation can be upheld if one of the two exceptions can be applied. The state interest exception was not directly considered in *Sporhase*. However, holding that the state ownership doctrine was a legal fiction left the exception not viable. *Id.* at 951. The second exception, congressional consent, presented the third issue in the case. Nebraska argued that the language in 37 federal statutes and in interstate compacts deferring to state law represented congressional consent. (The Reclamation Act of 1902, discussed above, is typical of statutes incorporating such language.) In *Sporhase* the Court said "[s]uch language mandates that questions of *water rights* that arise in relation to a federal project are to be determined in accordance with state law." 458 U.S. at 959 (emphasis added). State laws controlling water rights were already in place when these statutes were passed and Congress chose not to create a duplicate federal system. This is all deference to state laws means:

> Although the 37 statutes and interstate compacts demonstrate Congress' deference to state water law, they do not indicate Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred.

458 U.S. at 959-60 (emphasis added)

Congressional consent to a state statute burdening commerce is not easy to obtain. Congressional

consent must be "expressly stated." *Sporhase,* 458 U.S. at 959-960; see also *New England Power Co. v. New Hampshire*, 455 U.S. 331, 332 (1982). Congressional consent must be an "unambiguous statement" *Maine v. Taylor*, 477 U.S. 131, 139 (1986). The intent of Congress must be "unmistakably clear," *Wunnicke*, 467 U.S. at 91, and Congress must "affirmatively contemplate" the legislation at issue before it consents to state provisions that burden interstate commerce, *id.* at 91. Boilerplate language deferring to state law in statutes and interstate compacts does not meet this stiff requirement.

Most western compacts were in place by 1980, as were many of the federal statutes with language deferring to state law. In 1980 many western States had water statutes discriminating directly and indirectly against commerce. The *Sporhase* decision in 1983 made it clear that only "valid" provisions were entitled to deference, and that deference is to the appropriation process under which water rights are established. The federal government chose not to regulate in this very narrow area of water law. States can control the appropriation process and the process for transferring a water right, but state statutes must be constitutional.

IV. *TARRANT V. HERRMANN*

Our analysis of the Tenth Circuit opinion covers three questions. Are Oklahoma's laws prohibiting transport of water facially discriminatory, and if so, do they protect a legitimate local interest with no equally effective non-discriminatory options? If they are discriminatory, has Congress consented to what would otherwise be an unconstitutional burden on commerce? Does language in the compact granting

Texas an "equal right" to "runoff" allow Texas parties to apply for a water right in Oklahoma using Oklahoma law?

A. Oklahoma's Laws Are Discriminatory

The Oklahoma statutes in question are clearly discriminatory. The most objectionable statutes are those that: 1. Require legislative approval for out-of-state uses but not in-state uses, see Okla. Stat. tit. 82 § 105.12A(D); § 1085.2(2);§ 1324.10(B); 2. Prohibit the Oklahoma Water Conservation Storage Commission from granting permits for the sale or resale of water outside the State, see Okla. Stat. tit. 82 § 1085.22; 3. Put additional requirements on water to be exported that are not placed on in-state uses, see Okla. Stat. tit. 82 § 105.12(F); § 105.12A(B); § 105.12(A)(5); and 4. Require that long term water appropriations, such as those needed for municipal development, promote "optimal beneficial use of water" within Oklahoma, see Okla. Stat. tit. 82 § 105.12.(F). State statutes regulating interstate water exports must do so even-handedly and without discrimination. (*Hughes*, 441 U.S. at 331. These statutes are not "narrowly tailored" to protect a local interest. The Oklahoma statutes are clearly discriminatory.

Local interests could include water conservation and public welfare criteria such as public health, which implicate a State's police power. But, the local interest cannot relate to the "health" of the State's economy. In *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983), the court struck down New Mexico's water export statute, saying States could only discriminate "to the extent that water is essential to human survival. Outside of fulfilling human survival needs water is an economic resource." 563 F. Supp. at 389. Subsequently New Mexico amended its stat-

utes, and they were challenged again. Although some of New Mexico's provisions were upheld the court still said that "a state may not limit exports merely to protect local economic interests." *City of El Paso v. Reynolds*, 597 F. Supp. 694, 700 (D.N.M. 1984).

Oklahoma's limitations on water exports are clearly designed to benefit local economic interests. They have nothing to do with water conservation or protecting the health of Oklahoma citizens. The only way they can be upheld is if Congress has consented to what would otherwise be a clear violation of the Commerce Clause. As discussed above, congressional consent must be explicitly stated, unambiguous, unmistakably clear, and affirmatively contemplated.

B. Congressional Consent

Congress has not consented to these discriminatory state laws. Compacts are negotiated between States, sometimes with a federal observer present. Even when the federal observer serves as a facilitator, as was the case with the Red River Compact, the States control the substantive content of the compact, not the federal observer. The resulting contract is then approved by Congress, making it federal law. But, how can Congress "affirmatively contemplate" something it did not help negotiate? Also, did Congress "affirmatively contemplate" the Compact's Interpretive Comments? The Tenth Circuit partially relies on the interpretive comments in deciding Congress consented, see Pet. App. 25a, but it is doubtful Congress even saw these comments since they were not an intrinsic part of the Compact. Even if a few members of Congress from the compacting States were aware of these comments, is this really congressional

consent? Shouldn't the bar for granting an exception to Commerce Clause be higher than that?

The language of the Compact and the Interpretive Comments are not unmistakable clear or unambiguous. The Tenth Circuit relied on language in Section 2.01 of the Compact to justify its decision, noting that each signatory State is allowed to use the water allocated to it "in any manner deemed *beneficial by that state*." See Pet. App. 24a (emphasis added; internal quotation marks omitted); 86a. Does this mean that the water use can only benefit the State where the water is allocated? No. It means the State, as part of its allocation process, can define what uses are beneficial, but not in a way that discriminates against out-of-state interests. "Beneficial use" is the basic qualifier for establishing a water right under the appropriation doctrine. If the use is not "beneficial," no right exists. Western States, either legislatively or through court decisions, have defined what uses are beneficial. "Beneficial use" is the basis for all rights under the appropriation doctrine. But defining "beneficial use" requires that the same criteria be applied whether the use is in-state or out-of-state.

Section 2.01 also has a phrase allowing States to "freely administer" apportioned water. See Pet. App. 24a, 86a. This language recognizes that Oklahoma water rights law will apply to the allocation and reallocation of Compact water originating within its boundaries. Even if the place of use was destined to be in Texas, Oklahoma law would still control the allocation process. This would not be the first time water rights have been enforced across a state boundary. See *Weiland v. Pioneer Irrigation Co.* 259 U.S. 498 (1922). In addition, one case has even held that the law of the State where water is diverted con-

trols the right at least until the water crosses the state boundary. See *Turley v. Furman*, 16 N.M. 253 (1911).

The Compact terms "beneficial" and "freely administer" do not give Oklahoma freedom to do anything it wants to. These terms are not unambiguous. In fact, a plain-language reading of these terms can allow Oklahoma laws to control the appropriation process in ways that do not interfere with commerce. Nondiscriminatory alternative interpretations to the compact do exist. If more than one interpretation is possible, the Red River Compact should be interpreted in ways that avoid interference with interstate commerce.

Similarly, Section 2.10(a) of the Compact provides that nothing in the Compact will interfere with "the appropriation, use, and control of water" within a State's boundaries. Pet. App. 87a. The language in Section 8 of the Reclamation Act of 1902 is almost identical: "control, appropriation, use, or distribution of water". 43 U.S.C. § 383. As discussed above, all this provision does is give the State authority over the appropriation process. It does not give it permission to discriminate against interstate commerce. And the Interpretive Comments do not change this but merely confirm it. Each State "is free to continue its existing internal water administration, or modify it in any manner it deems appropriate." See Pet. App. 25a. Again, this is simply recognition that each States' "*valid*" existing laws for establishing water rights and reallocating water are recognized. Certainly the States have the power to amend these laws, but only in ways that are constitutionally appropriate. If a State could modify laws "in any manner it deems appropriate," then according to the

Tenth Circuit's logic a State could pass laws that would interfere with navigation. Interpreting this provision to allow a State to interfere with navigation would be improper, just as it would be to allow a State to impose a burden on commerce. Nothing in this section of the Compact or in the Interpretive Comments reflects permission to burden interstate commerce or to interfere with navigation. Such permission requires unambiguous statements. The language in these provisions can be interpreted in ways that are compatible with the Commerce Clause.

Section 2.10(a) also gives the States authority to regulate water quality within their boundaries. See Pet. App. 87a. To follow the Tenth Circuit's logic, this would allow States to supersede the Clean Water Act. Section 2.10(a) merely recognizes that States have some authority, but does not diminish existing federal authority. Interstate compacts cannot supersede federal statutory or constitutional provisions. *Gibbons*, 22 U.S. at 196. They are negotiated between States with minimal congressional input. On a few rare occasions compacts have been rejected or delayed because federal interests were obviously ignored. Two examples illustrate this point. The Republican River Compact was approved by Congress but initially vetoed by President Franklin Roosevelt because it attempted to limit federal power. Grant, D. L., Water Apportionment Compacts Between States § 46.03, in *Waters and Water Rights* (Lexis Nexis 2010). Also, the Carson Truckee Compact never made it through Congress, and a congressional allocation was substituted. If Congress or the President felt the Red River Compact had posed a limitation on federal power, a similar fate would have resulted.

Clearly, the Oklahoma statutes are designed to assert as much jurisdiction as possible over water. But Oklahoma's statutes cannot discriminate against commerce unless Congress consents. This is extremely important because the Tenth Circuit's interpretation of the Compact can be read in a way that abdicates all federal authority over compact water in Oklahoma. Congress would not choose a Compact as the vehicle for substantially changing the way jurisdiction over water is shared between the States and the federal government. A Compact is a contract, as the Court has said, but the federal government is not a party to it. Congress only approved it in order for it to be enforceable between the States.

C. Texas' Equal Right

The last aspect of the lower court opinion we address is the Compact provision related to Texas' equal share of subbasin 5. Oklahoma must allow Texas parties to establish a water right under Oklahoma's water law even if the use is outside the State. Section 5.05 of the Red River Compact makes this clear. See Pet. App. 88a-90a. The Red River Compact goes into considerable detail to allocate water to the signatory States. Section 2.12 goes to the effort of breaking the agreement into five river segments, and Sections IV-VIII apportion water in both fixed and percentage based allocations. Section 5.05 states the "Signatory States shall have *equal rights* to the use of *runoff* originating in subbasin 5." See Pet. App. 88a-89a (emphasis added). This section designates specific percentages each State should receive based on flow conditions in the river.

The term "runoff" has a specific meaning in the field of hydrology. "Runoff is all water transported out of the watershed by streams. Some of this water may have had its origins as overland flow, while much may have originally infiltrated and traveled through the soil mantel as interflow." Ward, A.D. and Stanley W. Trimble, *Environmental Hydrology* at 119 (2d ed., CRC Press LLC 2004). After a precipitation event water quickly moves as overland flow and subsurface flow (interflow) to the rivers and streams (watercourses) within the watershed. Determining what an equal share is requires a measurement. Runoff from a precipitation event is generally measured at a specific point downstream on a watershed where the cumulative effect of all flowing water can be taken into account. In subbbasin 5 runoff would be measured on the mainstem of the Red River at the downstream boundary of subbasin 5. Runoff includes all parts of the subbasin (watershed) including *all* tributaries. The Red River Compact requires that the *runoff originating* in subbasin 5 be equally shared. How can "runoff" in this portion of the Red River be interpreted to include only the disconnected tributaries originating within Texas? This is not the way runoff is measured. This is hydrologically impossible and a denial of the science associated with the hydrologic cycle. In measuring runoff, a water molecule coming from Texas cannot be distinguished from one originating in Oklahoma.

The geography of the boundary also needs to be considered in understanding what an "equal share" means from a practical perspective. Under the Red River's natural conditions Texas lacks access to the water the Compact grants under section 5.05. The Texas boundary stops on the south "cut-bank" of the Red River, see *Oklahoma v. Texas* 260 U.S. 606

(1923). The cut-bank is above the river's normal flood plain separating Texas' jurisdiction from "wet water" under most natural conditions. The tributaries within Texas' boundaries are the only portion of the watershed over which Texas has jurisdiction. These tributaries are inadequate to supply the "equal right" promised by the Compact.

The only way Texas can get its full share is to appropriate water across the border in Oklahoma using Oklahoma law. This is consistent with the language of the Compact granting Oklahoma jurisdiction over water rights. It makes no sense for Texas law to apply to a water right when the water originates within Oklahoma. Oklahoma can grant such rights and is required to do so within the limits set by the Commerce Clause. Nothing in the Compact allows Oklahoma statutes to place a burden on interstate commerce.

CONCLUSION

Jurisdiction over water can never be exclusive, as Oklahoma seems to desire. Water is mobile, circulating through the hydrologic cycle without regard to political boundaries. The hydrologic cycle describes water movement with terms like evaporation, precipitation, infiltration, overland flow, and subsurface flow, among others. These are natural processes that are impacted every time humans use water. These human uses interfere with the integrity of the hydrologic cycle by changing the pattern of movement or changing water quality. This is especially true of irrigation and municipal uses, which dam rivers and divert substantial volumes for uses far from the water's original location within the hydrologic cycle. If the cycle is looked at as a global cycle, sole jurisdic-

tion never occurs. This means water must be shared in some way. This sharing process can be very difficult, depending on what levels of government are involved and the balance of power between them.

Within the United States the Constitution defines those relationships, making the federal government supreme for those powers enumerated there. The residual powers remain with the States. Western States retained power over water rights allowing water to be bought and sold without regard to land ownership as long as public interests and third parties were not harmed. With the expanding size of projects, jurisdictional conflicts among States, and between States and the federal government, increased. Federal power over water, never well defined in the 1800's, became almost all-encompassing. States in the West retained power over the appropriation process with the consent of Congress. But power over the appropriation process does not include the power to interfere with commerce.

States have a proclivity to enact protectionist legislation that will benefit their own economy at the expense of other States. The fight over water is almost always over who gets the economic benefits, not whether it is needed for human health. If States were allowed to fully pursue economic protectionism, water would never leave their boundaries. When the Supreme Court is presented with protectionist conflicts between States it encourages them to negotiate Compacts. Compacts potentially allow an administrative structure that could resolve disputes and respond to changing conditions. Compacts, however, are not always very flexible, at least those compacts negotiated in the West. States were loath to give up jurisdiction. The result was very weak agreements.

Compacts routinely allow state appropriation laws to stand, as have many federal statutes. Allowing the States to establish water rights within their boundaries is logical even when the water is to be taken across a state boundary for use. It makes no sense to use the law of the State where the water is to be used, although an argument can be made for using both States' laws.

The Commerce Clause creates a national common market within the United States. Moving water, be it in raw form or imbedded in finished products, across a state boundary is part of that national market and is something that has a long history. State restrictions on transboundary movement can only occur if Congress consents. Compacts are often ambiguous and limited grants of power. In this case the Red River Compact contains nothing "unambiguously clear." Congress did not consent to a burden on interstate commerce. Certainly Congress did not "affirmatively consider" whether this was a burden on commerce when the compact was approved.

The Tenth Circuit's decision gives far too much weight to boilerplate language in the Red River Compact. Taken to its extreme, reading compacts and other federal laws to defer to state laws would give them a veto over federal laws. During the drafting of the Apalachicola-Chattahoochee-Flint River Basin Compact, Pub. L. 103-104, 111 Stat. 2219 (1997), some of the drafters saw the compact as a means "by which the requirements of existing federal laws and regulations could be circumvented." Sherk, G. W., *The Management of the Interstate Water Conflicts in the Twenty-First Century: Is it Time to Call Uncle?*, 12 N.Y.U. Env. L. J. 764, 772 (2005). Early drafts would allow the compact allocation to control instead

of federal law. This language was modified, however, because it was deemed "so politically unpalatable that congressional consent would be impossible." *Id.* at 773. The proposed language was explicit, but drafters of the compact felt it could not get congressional consent.

In this case the language in the Red River Compact is not explicit. The Tenth Circuit by implication interpreted the Compact in ways that exceed anything palatable to Congress. Consent to discriminatory state statutes must be "expressly stated," "unambiguous," and "unmistakably clear," and Congress must "affirmatively contemplate" otherwise invalid state legislation. The Red River compact does not meet that standard.

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
Petitioner,

v.

RUDOLF JOHN HERRMANN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* NORTH TEXAS COMMISSION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* NORTH TEXAS COMMISSION IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The North Texas Commission ("NTC") is a 501(c)(6) non-profit corporation that is a coalition of businesses, cities, counties, chambers of commerce, economic development entities, and higher education institutions in the North Texas Region.[1] The NTC was created on July 29, 1971, by a group of civic leaders from across North Texas who chartered the NTC as a non-profit, membership-supported organization that would work to promote the North Texas Region to maximize the visibility of the area as an ideal place to live and do business. Throughout its history, the NTC has worked to address regional problems and opportunities while focusing on ways to unify the North Texas Region.

Today the NTC represents the entire 12-county Dallas-Fort Worth-Arlington Metropolitan Statistical Area. The NTC works to ensure a model business environment and quality of life for the more than six million citizens that make up the Dallas-Fort Worth Metroplex ("Metroplex"). NTC is the only organization in North Texas that brings together the leadership of the public, private, non-profit, and higher education sectors to address regional concerns.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Consent to the filing of amicus curiae briefs, in support of either party or of neither party, was filed with the court by the Petitioner on February 19, 2013, and by the Respondents on February 12, 2013.

One of the most pressing regional concerns for the future of the North Texas area is water supply. Based on estimates of future supply and demand, the North Texas area will not have enough water to meet the needs of its people, its businesses, and other enterprises without obtaining additional water sources in the near future. Extensive economic losses are likely to occur if the area's water supply needs cannot be met.

To address water supply issues, the State of Texas is divided into sixteen regional water-planning groups that develop regional water plans. After approval of the Texas Water Development Board (the State agency in charge of water planning), the plans are incorporated into the State Water Plan. The Metroplex area is included in Region C. The Texas 2012 State Water Plan states the following with regard to future population and water demand increases in Region C:

> Approximately 26 percent of Texas' population resided in Region C in the year 2010. By 2060, the population of the region is projected to grow 96 percent to 13,045,592. Projections indicate that by 2060 Region C water demands will increase 86 percent.

Texas Water Development Board, *Water for Texas: 2012 State Water Plan*, at 46 (2012), http://www.twdb.state.tx.us/publications/state_water_plan/2012/02.pdf.

The 2011 Region C Water Plan identified water from Oklahoma as a recommended strategy to help meet this increase in population and water demand:

> Raw water from Oklahoma would cost about $2.09 per thousand gallons and would have

> relatively low environmental impacts because of the use of existing sources. Water from Oklahoma is a recommended strategy for Irving (25,000 acre-feet per year), North Texas Municipal Water District (50,000 acre-feet per year), the Tarrant Regional Water District (50,000 acre-feet per year) and the Upper Trinity Regional Water District (15,000 acre-feet per year), with a capital cost of $941,080,000.

Region C Water Planning Group, *2011 Region C Water Plan*, at 4D.14 (2011), http://www.twdb.state.tx.us/waterplanning/rwp/plans/2011/C/Region_C_2011_RWPV1.pdf ("Region C Plan"). Obtaining water from Oklahoma has also been a recommended strategy in the 2001 and 2006 Region C Water Plans. *Id.* at 4D.13.

As the North Texas area continues to experience rapid growth and declining water supplies, obtaining water from other sources is crucial to ensure public health, safety, welfare, and economic development in the area. The NTC is charged with working to improve the business environment and quality of life for the Metroplex area; therefore, NTC has an interest in this case as its outcome directly affects NTC's current and future efforts.

SUMMARY OF ARGUMENT

It has been well established that the North Texas area is going to experience increased growth and water demand over the next 50 years. Existing Region C water supplies cannot address these increases. The North Texas area has already implemented significant water conservation and reuse practices to improve water use efficiency. However,

the future water demands of the area cannot be addressed through conservation alone, and must be satisfied by acquiring new water supplies, preferably from areas experiencing a water surplus, like water from Oklahoma.

The Region C water supply problem has been compounded by recent decisions from the Fifth Circuit Court of Appeals that have thwarted previous attempts to increase the water supply in the North Texas area. Efforts to increase water supply through development of Fastrill and Waters Bluff Reservoir were prevented by these recent holdings and amplify the importance of the decision in this case.

The holding by the Tenth Circuit in the underlying case not only obstructs another effort by the North Texas area to obtain additional water supply, but it also misinterprets the law. The Tenth Circuit erred because the plain language of the Red River Compact explicitly grants Texas its equal right to the water within Reach II, Subbasin 5 of the Red River Basin, clearly providing Tarrant Regional Water District ("TRWD") the right to water from the Kiamichi River in Oklahoma. For these reasons, we support the arguments of the petitioner in this case and contend that the Tenth Circuit's decision should be reversed.

ARGUMENT

Respondents, particularly in their Supplemental Brief, suggest that TRWD, its main customer Fort Worth, and by implication the rest of the Metroplex including other amici curie (North Texas Municipal Water District, Upper Trinity Regional Water District, and City of Irving), have plenty of other options for additional water supply that they should utilize before pursing water from Oklahoma. Respondents

state that "[t]he Tenth Circuit's decision hardly consigns Fort Worth to drought or prevents petitioner from pursuing the many alternative sources it seeks." Resp. Supp. Br. 6. Indeed, Respondents suggest that TRWD would be unable to obtain a permit from the Oklahoma Water Resources Board ("OWRB") because of failure "to establish 'a present or future need for the water' in light of 'all stream water sources' and groundwater potentially available to petitioner." *Id.* In light of the uncertainty of the availability of additional supplies discussed below and the quantity of water needed for the Metroplex and other parts of the state, the ability to obtain water from Oklahoma is a very important component of Texas' State and Regional Water plans.

I. TEXAS AND THE METROPLEX NEED OKLAHOMA WATER

Texas has been developing its water resources through State Water Plans since the early sixties. Project planning has evolved over time from considering reservoir construction and massive multistate water importation projects to the 2012 State Water Plan that includes significant commitments towards water conservation, water reuse, and water desalination to supply water for municipal, agricultural, and industrial needs while providing substantial protection for the environment.

Today, Texas has developed most of its available reservoir sites and currently has little unappropriated water available for new use, making water efficiency essential. *See* Texas Water Development Board, *Water for Texas: 2012 State Water Plan*, at 26-27 (2012) http://www.twdb.state.tx.us/publications/state_water_plan/2012/01.pdf. If sufficient additional

supplies are not developed through efficiency improvements (e.g. conservation and reuse) and new water supplies, the negative impact to the Region C area economy will be extensive. Models show that Region C businesses and workers could lose approximately $5,176,000,000 in income in 2020, with that total increasing to an estimated $49,721,000,000 by 2060. *See* Texas Water Development Board, *Water for Texas: 2012 State Water Plan*, at 184 (2012) http://www.twdb.state.tx.us/publications/state_water_plan/2012/06.pdf. The State Water Plan states that TRWD, Dallas, and Fort Worth are the wholesale water suppliers with the largest 2060 water needs. *Id.* at 178.

Obtaining water from Oklahoma has been a recommended strategy for North Texas Municipal Water District, TRWD, and Upper Trinity Regional Water District since the 2001 State Water Plan. The City of Dallas and the City of Irving have evaluated obtaining Oklahoma water for some time as well. Oklahoma water is considered an alternative for Dallas and both an alternative and recommended water strategy for Irving in the 2012 State Water Plan. *See* Region C Plan at 4D13-14. The elimination of the Fastrill Reservoir site, *supra*, from the City of Dallas future water supply is likely to push water from Oklahoma from an alternative water strategy to a recommended strategy in the next State water planning cycle. *See* Region C Plan at 4E.8; Region C Water Planning Group, *Errata 2011 Region C Plan*, 4 of 13 (2011), www.twdb.state.tx.us/waterplanning/rwp/plans/2011/C/Region_C_2011_RWP_Errata3.pdf. Obtaining water from Oklahoma not only is cost effective, but it also would have a relatively low environmental impact, considering that new reservoir construction is not needed. *See* Region C Plan at 4D.14.

II. TEXAS AND THE METROPLEX ARE NOT WASTING WATER

The Metroplex has very aggressive conservation and reuse programs that allow utilization of as much water as possible from its existing supplies. These programs maximize the use potential of the Metroplex's existing water supplies.

A. Reuse

Reuse of water generally refers to the use of water that has already been beneficially used and is then treated at a wastewater reclamation plant. Direct reuse occurs when the water is taken directly from the plant and then reintroduced to a distribution system for use at a golf course or industrial site. Alternatively, water leaving a wastewater plant that is reused after being discharged into a watercourse is called indirect reuse. Many Metroplex water suppliers have implemented large-scale indirect reuse projects including TRWD, Trinity River Authority, and North Texas Municipal Water District. *See* Texas Water Development Board, *Water for Texas: 2012 State Water Plan*, at 170 (2012) http://www.twdb.state.tx.us/publications/state_water_plan/2012/05.pdf; Region C Plan at 4B.7-8. TRWD was the first wholesale water provider to use constructed wetlands as a biological filter. Treated wastewater is discharged by TRWD into wetlands for subsequent storage in its lakes for reuse through its existing and to-be-expanded conveyance system. *See* Texas Water Development Board, *Water for Texas: 2012 State Water Plan*, at 196 (2012) http://www.twdb.state.tx.us/publications/state_water_plan/2012/07.pdf; Region C Plan at 3.7-3.8, 4B.7.

Other reuse projects will be developed or expanded by Metroplex water utilities going forward; the State Water Plan states the existing supply of water from water reuse is a baseline of 182,686 acre-feet for 2010 and projects a total reuse of 307,129 acre-feet in 2060 for the Region C planning area. *See* Texas Water Development Board, *Water for Texas: 2012 State Water Plan*, at 171 (2012) http://www.twdb.state.tx.us/publications/state_water_plan/2012/05.pdf. When both proposed and existing projects are totaled, Region C is expected to reuse 636,000 acre-feet of water per year by 2060. Region C Plan at 4B.9.

B. Conservation

Water conservation focuses on efficiency of water use and reducing water demands. Municipal water conservation includes such practices as the installation of low-flow showerheads and toilets, water saving appliances (e.g. dishwashers, washing machines), and educating water users about their daily use of water resources. *See* Texas Water Development Board, Conserving Water Indoors (Feb. 2011), http://www.twdb.texas.gov/publications/brochures/conservation/doc/ConservingWaterIndoors.pdf; Texas Water Development Board, *Water for Texas: 2012 State Water Plan*, at 190 (2012) http://www.twdb.state.tx.us/publications/state_water_plan/2012/07.pdf.

In the 2012 State Water Plan, Region C is expected to pursue strategies that will increase its water conservation savings from the 2010 baseline of 46,780 acre-feet to 290,709 acre-feet by 2060. *Id.* In fact, Region C (when accounting for conservation and reuse) is projected to meet 36% of its water demand without conservation. Region C Plan at ES.8. In other words, with about 25% of the State's popula-

tion, Region C is expected to meet 40% of its water needs with the implementation of municipal conservation and reuse programs. *Id.* Significantly, 23% of Region C's 2060-projected water supply will be from conservation and reuse versus 16% from new water supplies including reservoirs. *Id.* at ES.13.

III. REDUCTION OF POTENTIAL ALTERNATIVE WATER SUPPLIES FOR TEXAS

The State of Texas and the Region C planning area options for utilization of the few remaining viable reservoir sites have been reduced by federal action and may be reduced even more. Efforts to increase the State's water supply through development of these reservoir sites were prevented by federal court action.

A. Fastrill Reservior

In *City of Dallas, Tex. v. Hall*, 562 F.3d 712 (5th Cir. 2009), the Fifth Circuit upheld the United States Fish and Wildlife Service's ("FWS") acceptance of a one-acre conservation easement within a newly designated part of the National Wildlife Refuge System ("Refuge System") that overlapped with the Fastrill Reservoir site. The Fastrill Reservoir site along the Upper Neches River had been identified in 1961 as a viable reservoir site by the state, was included in the State Water Plan since 1984, and was even designated a unique reservoir site in 2005 by the Texas Legislature. *Id.* at 715. The FWS became interested in the area in 1985 after the Fastrill Reservoir site was included in the 1984 State Water Plan. *Id.* The FWS evaluated the area and considered it a "Priority 1" preservation site in the Bottomland Hardwood Preservation Program. *City of*

Dallas, Tex. v. Hall, Nos. 3:07-CV-0060-P, 3:07-CV-0213-P, 2008 WL 2622809, at *11 (N.D. Tex. 2008). However, FWS did not conclude its studies until more than fifteen years later when it became apparent that the Fastrill Reservoir project was moving forward. *Hall*, 562 F.3d at 715-16. Acceptance of the conservation easement in August 2006 blocked reservoir construction without an Act of Congress "unless (1) the Department of the Interior and the Migratory Bird Conservation Commission determine that such lands are no longer needed for wildlife refuge purposes and the Department is paid the fair market value of the land, (2) the Department acquires other lands by exchange, or (3) such land is transferred pursuant to the terms of a cooperative agreement with a state or local government, by which agreement the land originally became part of the refuge system." *Sabine River Auth. v. U.S. Dep't of Interior*, 745 F.Supp. 388, 396 n.6 (E.D. Tex. 1990) (citing 16 U.S.C. § 668dd(a)(3)). This makes resurrection of the Fastrill Reservoir project extremely unlikely.

B. Waters Bluff Reservoir

Fastrill was not the first reservoir site blocked by a conservation easement accepted into the Refuge System. Earlier, the Waters Bluff reservoir site was blocked when, in *Sabine River Auth. v. U.S. Dep't of the Interior*, 951 F.2d 669 (5th Cir. 1992), the Fifth Circuit upheld FWS's acceptance of a 3,800 acre conservation easement into the National Wildlife Refuge system within the reservoir site. The Waters Bluff reservoir had been intended to supply over 300,000 acre-feet of water per year to Sabine River Authority's customers including the City of Dallas. *Id.* at 673. The federal district court in the Waters Bluff case also discussed the Bottomland Hardwood

Preservation Program that was used by FWS to support the decision to include lands in the Refuge System and to block the Waters Bluff reservoir and later the Fastrill reservoir. *See Sabine River Auth. v. U.S. Dep't of Interior*, 745 F.Supp. 388, 403 (E.D. Tex. 1990) ("the purpose of this program is to identify and seek methods for preserving as much of the remaining bottomlands habitats of east Texas as possible").

C. Other Threatened Water Supply Options

The Bottomland Hardwood Preservation Program has made the future of other potential Texas reservoir projects unclear, including Bois D' Arc Creek and Marvin Nichols Reservoirs that are also expected to supply water to the Region C area, along with other parts of the State. These project sites are located on land that is typically appealing to FWS's preservation efforts set out in the Bottomland Hardwood Program.

Bois D' Arc Creek Reservoir is a proposed reservoir on Bois D' Arc Creek in the Red River Basin, which would provide up to 123,000 acre-feet per year. *See* Region C Plan at 4E.24-25. The Bois D' Arc Creek Reservoir is a recommended strategy for the North Texas Municipal Water District, but "[t]he 1984 Fish and Wildlife Service *Texas Bottomland Hardwood Preservation Program* report classified the Bois d'Arc Creek bottoms in the reservoir as Priority 4 bottomland hardwoods, which are 'moderate quality bottomlands with minor waterfowl benefits.'" *Id.* at 4D.14.

The development of Marvin Nichols Reservoir was a recommended strategy for Region C in the 2001 and 2006 Region C Water Plans, with an estimated yield

of 612,300 acre-feet per year. *Id.* at 4D.8. It continues to be a recommended strategy in the 2012 State Water Plan for TRWD, North Texas Municipal Water District, and the Upper Trinity Regional Water District and an alternative source of water supply for Dallas Water Utilities and the City of Irving. *Id.* at 4E.2. The project would provide a large source of additional water for the Metroplex at a relatively low cost. *Id.* However, "[t]he 1984 U.S. Fish and Wildlife Service *Bottomland Hardwood Preservation Program* classified some of the land that would be flooded as a Priority 1 bottomland hardwood site, which is 'excellent quality bottomlands of high value to key waterfowl species.'" *Id.* at 4D.8. This classification as a Priority 1 site is the same classification given to Fastrill and Waters Bluff Reservoir, and its abundant water resource potential could be denied for North Texas use.

The threatened nature of these projects has rendered the access to Oklahoma water supplies evermore essential to ensuring the welfare of projected economic and population growth in North Texas. With the Metroplex's future water demand greatly exceeding improvements in water efficiency, despite extensive conservation and reuse efforts, some of this demand can only be met by utilizing additional supplies. It is imperative that petitioner's right to Oklahoma water be upheld and the Tenth Circuit's judgment reversed.

IV. THE RED RIVER COMPACT GRANTS TEXAS EQUAL RIGHTS TO REACH II, SUBBASIN 5

The Red River Compact was entered into by Arkansas, Louisiana, Oklahoma, and Texas in 1978 and

was ratified by Congress in 1980. *See* Pub. L. No. 96-564, 94 Stat. 3305 (1980). The Compact provides "an equitable apportionment among the Signatory States of the water of the Red River and its tributaries," and states that "[e]ach Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state." *Id.* §§ 1.01(b), 2.01. Section 5.05 of the Compact, which defines and apportions the rights in Reach II, Subbasin 5, states as follows:

> The Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second.

§ 5.05(b)(1), 94 Stat. 3311. Sections 5.05(b)(2) and (b)(3) further restrict upstream diversions during times of lower flow. *Id.* § 5.05(b)(2), (3).

An interstate compact, like the Red River Compact, is a legal document "that must be construed and applied in accordance with its terms." *Texas v. New Mexico*, 482 U.S. 124, 128, 107 S.Ct. 2279, 96 L.Ed.2d 105 (1987). The Tenth Circuit erred by not construing and applying the Red River Compact in accordance with its terms.

The Tenth Circuit Court of Appeals held that Section 5.05 of the Red River Compact "does not say that a Texas user is entitled to take Texas's share of th[e] water from a tributary located in Oklahoma." *Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d

1222, 1245 (10th Cir.2011). This reading ignores the straight-forward language of the Compact. The Compact explicitly states that Texas shall have "equal rights" to water in Reach II, Subbasin 5, and defined certain waters in that subbasin as being, in part, within Oklahoma. By this construction, the Compact clearly allows the petitioner to divert part of Texas' share of water from within Oklahoma, or anywhere else within Reach II, Subbasin 5. If the intent of the drafters of the Compact was to only allow each Signatory State to ultimately divert water within their borders, they would not have given each State rights to water in locations that are clearly not accessible from that State's boundary. The United States correctly observes that other sections of the Compact do restrict water use in certain subbasins as only being "within their respective states." U.S. Br. 13 (citing § 5.03(b), 94 Stat. 3310).

The Tenth Circuit Court incorrectly focuses on the language of Section 5.05(b)(3) as justification for its interpretation. *Herrmann*, 656 F.3d at 1243-45. Section 5.05(b)(3) provides that when the flow is below 1,000 cfs, the upstream States "shall allow a quantity of water equal to all the weekly runoff originating in subbasin 5 and all undesignated water flowing in subbasin 5 within their states to flow into the Red River as required to maintain a 1,000 cubic foot per second flow at the Arkansas—Louisiana state boundary." § 5.05(b)(3), 94 Stat. 3311. This section simply requires the states to allow a certain amount of water to reach the Red River from the tributaries during times of low flow. The Tenth Circuit interprets this section as recognizing each state's authority to regulate water use "within its boundaries." *Herrmann*, 656 F.3d at 1243. This section actually

recognizes each state's authority to regulate water use "within its jurisdiction."

CONCLUSION

The judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
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No. 11-889

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A Texas State Agency,

Petitioner,

v.

RUDOLF JOHN HERRMANN, et al.,

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BRIEF OF NORTH TEXAS MUNICIPAL WATER DISTRICT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The North Texas Municipal Water District ("NTMWD"), like the petitioner, Tarrant Regional Water District ("Tarrant"), is a water district in North Texas desperately grappling with supplying water to an ever-growing population amidst ongoing drought conditions.[1] NTMWD supplies drinking water to over 1.6 million people in North Texas. NTMWD's service area includes all or parts of Collin, Dallas, Denton, Fannin, Hopkins, Hunt, Kaufman, Rains, and Rockwall Counties. NTMWD's enabling legislation authorizes it to acquire any rights in, and to storage and storage capacity in, any reservoir or other water source. Tex. Civ. Rev. Stat. art. 8280-141, § 7(a). NTMWD is also empowered by its enabling legislation to construct or otherwise acquire all works, plants, and other facilities necessary or useful for the purpose of storing, impounding, retaining, diverting, or processing this water and transporting it to cities

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. SUP. CT. R. 37.2(a). Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae* or their members made a monetary contribution to its preparation or submission. SUP. CT. R. 37.6.

and other areas for municipal, domestic, and industrial purposes. *Id.*

Because of ongoing drought conditions and bleak predictions of future drought conditions, NTMWD, Tarrant, and other North Texas water providers must identify and develop additional water supplies to meet the demands of their customers, whose population continues to grow. NTMWD has not stood idly by during these drought conditions but has made extraordinary efforts to combat drought conditions by implementing extensive water conservation and drought contingency measures in accordance with its state-approved 2008 Water Conservation and Drought Contingency Plan ("Drought Plan"). Over the last several years, NTMWD has expended close to $10 million on water conservation-related public education programs, and it has given these programs to other public water suppliers across Texas.

NTMWD has also made significant investments to use reclaimed water – another form of water conservation. In April 2009, the NTMWD placed into service the East Fork Raw Water Supply Project, which is one of the largest constructed wetlands in the U.S. at 1,840 acres. The constructed wetland project uses reclaimed water to augment surface water supplies and will provide, at ultimate capacity, 102,000 acre-feet of water per year. Recognizing the need to continue water conservation measures given future drought predictions, NTMWD has also been in some stage of drought management under its Drought Plan since April 2011 and is currently in Stage 2 of its

Drought Plan, which only allows outdoor watering twice a week. Unfortunately, even with these considerable conservation efforts, NTMWD still requires additional water supplies to meet its customers' increasing demands for water.

Comparing NTMWD's restrictive and conservative use of water to the State of Oklahoma's water use is like comparing a drought to a flood. The State of Oklahoma essentially lets the faucet run – discharging on average 36 million acre-feet of unused stream water into various tributaries bound for the Gulf of Mexico each year. Oklahoma Water Resources Board, *Oklahoma Water Facts* (Feb. 2012), available at http://www.owrb.ok.gov/util/waterfact.php. Of this prolific water supply, Oklahoma taps only 1.87 million acre-feet and allows the remainder to be discharged to the Gulf of Mexico, unused and wasted. Oklahoma Water Resources Board, *Oklahoma Comprehensive Water Plan, Water Demand Forecast Report* Table 27 (Dec. 2012), available at http://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/WaterPlanUpdate/WaterDemandForecastReport.pdf. And, by 2060, Oklahoma is only expected to use 2.48 million acre-feet, which means that water will continue to be unused for *decades* while other regions suffer. *Id.*

Given this ample, unused water supply, NTMWD is surprised that Oklahoma makes every effort to block another's use of this water that will otherwise be wasted. But, Oklahoma has effectively prevented any use of this water outside its borders by enacting a series of laws that ultimately create an embargo

on the exportation of water from Oklahoma for use in any other state ("Oklahoma Water Statutes"). See, *e.g.*, Okla. Stat. tit. 82, §§ 105.9, 105.12, 105.12A, 105.16(B), 1085.2(2), 1085.22, 1086.1(A)(3). For example, one such statute requires the Oklahoma Water Resources Board ("OWRB"), when reviewing an application for use of water out of state, to evaluate whether the water "could feasibly be transported to alleviate water shortages in the State of Oklahoma." Okla. Stat. tit. 82, § 105.12(A)(5). Another Oklahoma Water Statute imposes additional considerations regarding Oklahoma's compact obligations that only apply when a permit application is "to use water outside the boundaries of the State." *Id.* § 105.12A(B). The clear purpose of these statutes is to prevent any use of water outside of Oklahoma's boundaries, particularly within Texas.

In addition to considerable conservation efforts, NTMWD is also actively pursuing the development of other water supply options within Texas, including the development of a new reservoir, the construction of a reverse-osmosis potable water treatment plant to be able to use high salinity surface water supplies, and water supply contracts with other regional water supply providers. These potential supplies alone, with continuing drought conditions and increasing water demands, will be insufficient to meet the needs of NTMWD's customers in the future.

To secure additional water supplies for its 1.6 million customers, NTMWD, like Tarrant, has also filed water rights applications with the OWRB. One

of NTMWD's applications seeks to appropriate water within the Kiamichi River that is located in reach II, subbasin 5 of the Red River Basin – a subbasin within which Texas is granted an equitable apportionment pursuant to the Red River Compact (the "Compact"). Pub. L. No. 96-564, 84 Stat. 3305 (1980). This application gives NTMWD a direct interest in this case not only because it generally seeks to secure water from Oklahoma, but because this existing application seeks water that is directly affected by the Tenth Circuit's decision below. Moreover, NTMWD is extremely troubled by the broader impacts of the Tenth Circuit's decision – the elimination of a vast, virtually untapped water supply for a region of Texas in desperate need of such water. Undoubtedly, economic development in North Texas will be stifled, if not crippled, without the water apportioned to Texas by the Compact.

SUMMARY OF ARGUMENT

It is a simple fact – the economic growth and viability of communities need water to thrive. Water is the lifeblood of every community – without it communities wither away and die. The communities within North Texas are no different. With continuing drought conditions and an ever-expanding population, North Texas requires additional water to satisfy the future increased demand. Wholesale water providers like NTMWD and Tarrant seek to meet these water demands by securing the water that is granted

to Texas under the Compact but is only truly accessible in Oklahoma.

The Tenth Circuit's erroneous interpretation of the plain language of the Compact prevents both NTMWD and Tarrant from using those additional water supplies. If the Tenth Circuit had employed a plain language reading of the Compact instead of distorting the Compact's language through misapplication of the presumption against preemption, the court would have determined that the Oklahoma Water Statutes are preempted by the Compact. The plain language of the Compact, by its express terms, grants Tarrant, on behalf of Texas, an equitable apportionment of water within reach II, subbasin 5 of the Red River Basin – and that right to an equal portion is not conditioned upon such water being located within Texas.

ARGUMENT

I. The Oklahoma Water Statutes are Improper Economic Protectionism Adversely Affecting Texas.

The value of water is immeasurable – and for many years, people believed it would exist in perpetuity. But with populations booming, particularly in North Texas, this belief is confronted by the harsh reality that existing water supplies are limited and additional water supplies must be secured. In Texas, this reality hit hard in 2011 when drought conditions

reached an extreme state, with 23 public water systems in Texas claiming to have less than six months' water supply. Marc Airhart, *Five Key Lessons (and Challenges) from the Great Texas Drought* (Sept. 2012), available at http://www.utexas.edu/know/2012/09/10/great-texas-drought.

Since December 21, 2010, the Governor of the State of Texas has continued to issue emergency proclamations regarding the severity of drought conditions in Texas with the most recent proclamation issued on January 25, 2013. Office of the Governor of Texas, *Gov. Perry Again Renews Proclamation Extending Drought Emergency* (2013), available at http://governor.state.tx.us/news/proclamation/18115/. In Texas, 2011 was the driest year ever with an average rainfall of only 14.8 inches of rain. StateImpact, *Everything You Need to Know About the Texas Drought* (2013), available at http://stateimpact.npr.org/texas/tag/drought. As of January 2013, 90 percent of Texas was suffering from some level of drought and reservoirs in Texas averaged only 66 percent full. *Id.* According to the Texas State Climatologist, Texas's water conditions continue to look grim as it appears that the current drought may end up being the drought of record for most of the state. David Barer, *Finding Water Amid the Drought: Legislature Considers Options* (Feb. 2013), available at http://stateimpact.npr.org/texas/2013/02/05/finding-water-amid-drought-legislature-considers-options/.

For North Texas in particular, 2013 promises continued drought conditions that will likely extend

into the hot season. National Weather Service, Dallas/Fort Worth, Texas Weather Forecast Office, *Drought Information Statement* (Feb. 2012), available at http://forecast.weather.gov/product.php?site=FWD&issuedby=FWD&product=DGT. These drought conditions coupled with increasing populations create a demand for water that existing water supplies cannot meet. And, the lack of water supplies will no doubt have a catastrophic effect on North Texas by depressing, if not completely halting, the region's economic growth and development.

The predicted economic impacts are quite startling. In a single year when water demands of North Texas are unmet and severe drought persists, the region could lose a quarter of a million residents and nearly 550,000 jobs, at a cost to the regional economy of over $61 billion. Region C Water Planning Group, *2011 Region C Water Plan* ("Region C Plan") ES.7 (2011), available at http://www.twdb.state.tx.us/waterplanning/rwp/plans/2011/C/Region_C_2011_RWPV1.pdf. Not surprisingly, this negative economic impact would likely have ripple effects into southern Oklahoma given the connectivity between the economies of Northern Texas and Southern Oklahoma. William S. Spears School of Business, *Multi-regional Input-Out Model for the Dallas & Oklahoma City Metro. Areas* 7 (Jan. 2010), available at http://economy.okstate.edu/caer/files/OKCDFW_MRIO_Final.pdf.

Since 1961, in an effort to ensure that sufficient water supplies exist, even during drought conditions, the State of Texas has developed a state water plan

"for orderly and economic development of the water resources" of Texas. Texas Board of Water Engineers, *A Plan for Meeting the 1980 Water Requirements for Texas* iii (May 1961), http://www.twdb.state.tx.us/publications/State_Water_Plan/1961/1961.pdf. The past three state water plans have been based on a regional water supply planning process that is incorporated into the state water plan. The regional water plan for North Texas, which includes NTMWD and Tarrant, is the Region C Plan. According to the most recent Region C Plan, in 2060 the region will have demand of 3.3 million acre-feet of water per year – meaning it will have a shortage of 1.5 million acre-feet of water per year by 2060. Region C Plan at ES.6.

Wholesale water providers like NTMWD and Tarrant do not take this predicted water shortage lightly and actively seek to develop new water supplies in accordance with the Region C Plan. NTMWD and Tarrant both actively contribute during the regional planning process. The Region C Plan identifies a number of potential water supplies to be developed by wholesale water providers to meet the needs of the growing populations in this region. The Region C Plan specifically identifies the Red River Basin in Oklahoma as a "recommended major water management strategy" for both NTMWD and Tarrant. Region C Plan at ES.10.

NTMWD and Tarrant, as state agencies that provide water to a collective population of 3.3 million and growing, must be allowed equal right to use of water that the Compact declares to be apportioned to

Texas. This water will not only be used in North Texas, but the return flows will be discharged into the Trinity River Basin and subsequently reused by downstream interests, including the City of Houston. If the water remains in Oklahoma, the use – if one can call it that – of water is vastly different with a majority of the water wasted and allowed to simply flow into the Gulf of Mexico. Oklahoma can claim no harm from allowing Texas the use of water it wastes, particularly when that water is rightly apportioned to Texas under the Compact.

II. The Court Should Reverse the Decision of the Tenth Circuit and Hold that the Plain Language of the Red River Compact Preempts the Oklahoma Water Statutes.

A. The Tenth Circuit Erroneously Applied the Presumption Against Preemption and Failed to Employ a Plain Language Reading of the Compact.

The Tenth Circuit determined in error that the Compact did not preempt the Oklahoma Water Statutes. This error resulted from the Tenth Circuit's improper application of the presumption against preemption of state law and its failure to use a plain language reading of the Compact as recently employed by this Court in *Montana v. Wyoming*, 131 S.Ct. 1765 (2011).

The Supremacy Clause of the U.S. Constitution provides that the laws of the United States "shall be

the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Once an interstate compact has been consented to by Congress, it becomes federal law and is protected by the Supremacy Clause, meaning any state law in conflict with such compact is without effect and preempted. *Cuyler v. Adams*, 449 U.S. 433, 440 (1981); *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008). When federal law lacks an express preemption clause, the Court generally has used a presumption against implied conflict preemption to avoid conflict with state law to the extent possible. See, *e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). Presumption against preemption is even more likely in cases when Congress has "legislated . . . in [a] field which the States have traditionally occupied." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In those cases, the Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.*

The basic purpose of the presumption against preemption is to preserve a state's ability to legislate alongside Congress. *Wyeth*, 555 U.S. at 565 n.3 (citations omitted). But, this presumption has no place in the interpretation of interstate compacts. An interstate compact *is* the legislation of states that is blessed by the U.S. Congress – so no reason exists to preserve a state's ability to legislate when that state has already done so as a party to the interstate

compact. And further, although the Tenth Circuit failed to directly address it, the language of the Compact specifically provides that the terms of the Compact shall ultimately trump, or preempt, state laws and regulations that are not "in accordance with the apportionments made by this Compact" or are "inconsistent with [a Signatory State's] obligations under [the] Compact." Compact §§ 2.01, 2.10(a). Because the Compact expressly provides that the Compact itself shall preempt state law in the event of a conflict, the Tenth Circuit had no reason to apply the presumption against implied preemption. And even if such language in the Compact is not recognized as expressly preempting state law, presumption against preemption should clearly not apply to interstate compacts.

Instead of distorting the language of the Compact through the misapplication of the presumption against preemption, the Tenth Circuit should have conducted a plain language reading of the Compact. The language agreed upon and negotiated by states in interstate compacts must be given deference because such language is presumed to be "the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties." *New Jersey v. Delaware*, 552 U.S. 597, 615-16 (2008) (quoting *Rocca v. Thompson*, 223 U.S. 317, 332 (1912). This Court has consistently recognized the importance of the plain language in interstate compacts. In *Texas v. New Mexico*, 462 U.S. 554 (1983), this Court

addressed the question of whether a federal representative could act as a tie-breaker on a compact commission over a disputed issue. In looking to the plain language of the Pecos River Compact, the Court held that because the language of the compact clearly did not provide for such a tie-breaker in a compact commission, the Court was "not free to rewrite [the compact]." *Id.* at 565.

In *Montana*, this Court again deferred to the plain language of the interstate compact at issue and refrained from rewriting its language. 131 S.Ct. at 1778-79. Montana asserted that Wyoming breached the Yellowstone River Compact by increasing their net water consumption through more efficient irrigation systems. *Id.* at 1769. Montana's assertion turned on the definition of "beneficial use," which it defined by the amount of depletion resulting from use of water. *Id.* at 1778. Montana claimed this definition of "beneficial use" required Wyoming to not deplete its water rights beyond pre-1950 depletion levels. *Id.* The Yellowstone River Compact expressly defined "beneficial use" as being "that use by which the water supply of a drainage basin is depleted when usefully employed by activities of man." *Montana*, 131 S.Ct. at 1778. This Court rejected Montana's interpretation of "beneficial use" because "Montana's reading . . . does not follow the text [of the compact] and would drastically redefine the term 'beneficial use' from its long-standing meaning." *Id.* at 1778. The Court determined, based on the plain language of the compact, that "[n]othing in the language suggests that 'beneficial

use' means a measure of the *amount* of water depleted . . . 'beneficial use' within the meaning of the compact . . . is a *type* of use that depletes the water supply." *Id.*

In accordance with *Texas* and *Montana*, the Tenth Circuit should have applied a plain language reading to the Red River Compact.

B. The Plain Language of the Compact Expressly Grants Texas an Equitable Apportionment of Water Regardless of State Boundaries and Preempts the Oklahoma Water Statutes.

In keeping with the prior decisions in *Texas* and *Montana*, the Court should reverse the decision of the Tenth Circuit and refuse to rewrite the plain language of the Red River Compact.

The Compact provides that the Red River Basin is divided into five stream "reaches" that are in turn divided into subbasins. Within reach II, subbasin 5, the apportionment of which is at issue in this case, the Compact grants the signatory states "equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second." Compact § 5.05(b)(1). Of significant note, the segment of the Red River in reach II,

subbasin 5 does not flow into or through Texas, meaning Texas can only acquire its full water allocation in this reach by securing most of such water from Oklahoma.

In addition to this specific language regarding allocation of water, the Compact also includes general provisions that set forth how the signatory states are to use these water allocations. Under Section 2.01, the Compact provides that "[e]ach state may freely administer water rights and uses in accordance with the laws of that state, *but* such uses shall be subject to availability of water *in accordance with the apportionments made by this Compact.*" Compact § 2.01 (emphasis added). Another general provision used in virtually every interstate water compact also provides that "[n]othing in this Compact shall be deemed" to "interfere with or impair the right . . . of any Signatory State to regulate within its boundaries the appropriation, use, and control of water" as long as that right is "*not inconsistent with its obligation under this Compact.*" *Id.* § 2.10(a) (emphasis added).

In reading the Compact, particularly the above-discussed provisions, the Tenth Circuit failed to grasp its plain language. The Compact sets forth that signatory states are granted "equal rights to the use of" the water within reach II, subbasin 5. Compact § 5.05(b)(1). Instead of holding that Texas, specifically Tarrant, has equal rights to that water, the Tenth Circuit instead read Section 2.01 as granting signatory states "broad discretion to regulate the use of their water apportionments," meaning Oklahoma

Water Statutes were not preempted by the Compact and could effectively prevent Texas from securing its share of water that is only accessible in Oklahoma. *Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d 1222, 1242 (10th Cir. 2011), *cert. granted*, 133 S.Ct. 831 (U.S. Jan. 4, 2013) (No. 11-889). But the Tenth Circuit's reading ignores the plain language in the Compact that makes a signatory state's free administration of water rights expressly subject to "the availability of water in accordance with the apportionments made by this Compact." Compact § 2.01.

The Compact's plain language apportions to each signatory state "equal rights to the use of" the water in reach II, subbasin 5, and each state is entitled to not "more than 25 percent of the water in excess of 3,000 cubic feet per second." Compact § 5.05(b)(1). A plain reading of this language can only result in a determination that Tarrant, on behalf of Texas, has a right to its equal apportionment of water in the reach even though such water is primarily located in Oklahoma. No further interpretation of the Compact is necessary to make this determination because the plain language is clear as to the Compact's meaning.

The Compact's language regarding the allotment of water in other subbasins supports a reading of the Compact that the apportionment of water in reach II, subbasin 5 is not restricted to usage within each state's respective boundaries. Section 5.03(b) of the Compact provides that "[t]he States of Oklahoma and Arkansas shall have free unrestricted use of the water of [reach II, subbasin 3] *within their respective*

states." Compact § 5.03(b) (emphasis added). This clearly provides that water use is restricted based on state lines. Likewise, Section 6.03(b) grants "Texas and Louisiana *within their respective boundaries* . . . unrestricted use of the water of [reach III, subbasin 3]." Compact § 6.03(b) (emphasis added). This section of the Compact also restricts each state's use of water from this reach to within each state's respective borders. In contrast, Section 5.05(b)(1) includes no restriction to use of water within each state's respective boundaries. A fundamental precept of statutory construction requires "giving effect to the meaning and placement of words chosen." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 645 (1990). If the signatory states had intended for water allocations to be restricted to usage within each state's respective boundaries in reach II, subbasin 5, like they restricted water usage in reach II, subbasin 3 and reach III, subbasin 3, such language would have been included in Section 5.05(b)(1) – but it was not. Because the signatory states did not include the restrictive language, it is clear that usage was not restricted to within each state's respective boundaries for reach II, subbasin 5.

Making every effort to avoid preemption of the Oklahoma Water Statutes, the Tenth Circuit said essentially that a signatory state's equal right to use of water is in fact *unequal* if that state is unable to secure such water within its own borders. In essence, the Tenth Circuit has rewritten Section 5.05(b)(1) to read that "[t]he Signatory States shall have equal

rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5 *if and only if such water is accessible within the borders of such State.*" But, as the Court held in *Texas* and *Montana*, the Tenth Circuit cannot ignore the plain language used by the states in the Compact.

This Court has made clear that it cannot re-write the terms of an interstate compact and it should not do so now. The Compact contains no provision prohibiting Tarrant, on behalf of Texas, from accessing its equal share of water in Oklahoma, and thus, Tarrant is free to enter Oklahoma to access water apportioned to it. The Compact clearly preempts the Oklahoma Water Statutes. The Oklahoma Water Statutes effectively prevent Tarrant, on behalf of Texas, from accessing *any* water in Oklahoma, including the water apportioned to Texas pursuant to the Compact, creating a clear conflict with the Compact that grants Texas an equal apportionment of the water in reach II, subbasin 5.

The Tenth Circuit should have followed the decisions in *Texas* and *Montana* and interpreted the plain language of the Compact as requiring that Tarrant be given an equal right to use of water within reach II, subbasin 5 of the Red River Basin even if such water is only accessible in the State of Oklahoma.

CONCLUSION

The decision of the Tenth Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,

Petitioner,

v.

RUDOLF JOHN HERRMANN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* CITY OF OKLAHOMA CITY AND OKLAHOMA CITY WATER UTILITIES TRUST IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the allocations of surface water as approved by Congress in an interstate compact, Congress's stated basis for authorizing and funding a federal reservoir project, and the plenary authority exercised by a State over its surface water resources can all be ignored to allow a State to access another State's internal water resources in disregard of statutes regulating that resource.

2. Whether a dormant Commerce Clause analysis can be used to define and restrict the scope of the plenary authority over surface water resources that was expressly delegated to the States by Congress.

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BRIEF OF *AMICI CURIAE* CITY OF OKLAHOMA CITY AND OKLAHOMA CITY WATER UTILITIES TRUST IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*[1]

The City of Oklahoma City, an Oklahoma municipal corporation ("OKC") and the Oklahoma City Water Utilities Trust ("OCWUT") (collectively referred to as "OKC") have relied on water located in southeastern Oklahoma to ensure a reliable municipal water supply for their service area in central Oklahoma. OKC has acquired water and has pending permits to acquire water for its municipal water supply from several tributaries to the Red River, the Kiamichi and Muddy Boggy Rivers, located in southeastern Oklahoma and allocated to Oklahoma as part of Reach II of the Red River Compact ("Compact"). Prior to use in OKC, the water appropriated from Reach II is stored in Atoka Lake and in Sardis and McGee Creek Reservoirs. Sardis and McGee Creek Reservoirs were funded and authorized by Congress for the express purpose of providing OKC with a municipal water supply.

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[1] Pursuant to Rule 37.6, OKC and OCWUT affirm that no counsel for a party authored this brief in whole or in part and that no person other than OKC and OCWUT and its counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.3(a), OKC and OCWUT have obtained the blanket written consent of all parties to the filing of this brief, and copies of those written consents were filed with the Clerk of the Court on February 12 and February 19, 2013.

Tarrant Regional Water District ("Tarrant") claims that the Compact authorizes it to ignore Oklahoma's statutes regulating the allocation of its internal water resources and access Texas's allocation of Compact water within Oklahoma's boundaries.[2] Tarrant's contention is based on the drought conditions in Texas and its erroneous statements that Congress authorized and funded Sardis Reservoir to provide north Texas with a municipal water supply. In essence, Tarrant is asking this Court to rewrite the express terms of the Compact, to ignore Oklahoma's plenary authority over its internal surface water resources, and to modify the basis for Congress's funding and authorization of Sardis Reservoir because of Tarrant's opinion that north Texas needs the water more than Oklahoma. Resolution of Tarrant's claim that it is entitled to access Texas's allocation of Compact water without being subject to Oklahoma's plenary authority over its internal surface water resources has a direct impact on OKC's municipal water supply in southeastern Oklahoma that it has developed, invested in, and relied on since the 1950s.

The Water Shortage in Central Oklahoma

The majority of Oklahoma's water supply comes from precipitation that falls within its borders. *Oklahoma Comprehensive Water Plan* ("OCWP"), *Supplemental*

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[2] Tarrant is claiming a surface water appropriation from Reach II. No claims for ground water are involved in this case.

Report: Climate Issues & Recommendations, 2 (Dec. 2010) ("*Climate Report*").[3] Oklahoma is divided by the 100th meridian, which creates drastic variations in the amount of precipitation received across the State. R.L. Nace & E.J. Pluhowski, *Drought of the 1950's with Special Reference to the Midcontinent*, 8 (Geological Survey Water-Supply Paper 1804) (1965). The eastern portion of Oklahoma typically receives fifty-six inches of precipitation per year, while the western portion only receives seventeen inches per year. *Climate Report*, at 3. OKC receives approximately thirty inches of precipitation per year.

In the 1950s, Oklahoma experienced a severe drought during which OKC faced critical water supply shortages. Nace, *supra*, at 1, 79. As a result, OKC began to investigate the feasibility of exporting water from southeastern Oklahoma to alleviate its shortages. *Id.* Beginning in the mid-1950s, numerous studies were prepared and submitted to the federal government that analyzed the feasibility of transporting water from southeastern to central Oklahoma. *See, e.g.*, G.B. Treat and F.J. Wilson, *Navigation and Water Supply Studies, Southeast and Central Oklahoma* (prepared for the Army Corps of Engineers ("COE")) (Nov. 18, 1958) (containing a series of

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[3] The 2012 Oklahoma Comprehensive Water Plan was finalized and approved on October 17, 2011. The various reports that were included in the OCWP are available at http://www.owrb.ok.gov/supply/ocwp/ocwp.php.

engineering reports that describe several options for transporting water from southeastern to central Oklahoma); Project HOW, Action Conference, A Blueprint for Industrial Development, Water Supply Navigation (July 10-11, 1958) (discussing water projects designed to transport water from southeastern to central Oklahoma); *Oklahoma's Long-Range Water Requirements* (prepared for the Bureau of Reclamation) (Jan. 1965) (summarizing Oklahoma's increasing municipal water demands and the need to find long-term solutions to satisfy those demands). These studies ultimately culminated in Congress's authorization of several federal reservoirs in southeastern Oklahoma to supply OKC with a long-term and reliable municipal water supply. *Municipal and Industrial Water Requirements Hugo, Tuskahoma, and Clayton Reservoirs Kiamichi River Basin Oklahoma: A Report on a Portion of the Southeastern Oklahoma and Western Arkansas Comprehensive Water Resources Study* ("*Water Resources Study I*" or "*Study I*"), app. IV to S. Doc. No. 145 (Dec. 1960) (prepared by the Public Health Service, Region VII); *Water Resources Study, Southeastern Oklahoma and Southwestern Arkansas, Study of Potential Needs and Value of Water for Municipal, Industrial, and Quality Control Purposes* ("*Water Resources Study II*" or "*Study II*") (July 1962) (prepared by the Public Health Service, Region VII) (both stating that the primary justification for the federal reservoirs in southeastern Oklahoma is to

provide OKC with a reliable municipal water supply).[4] *Water Resources Study I* is an appendix to Senate Document 145, which was approved by Congress when it authorized Sardis (previously named Clayton) and Tuskahoma Reservoirs, and modified Hugo Reservoir. Flood Control Act of 1962, Pub. L. No. 87-874, 76 Stat. 1173, 1187 (Oct. 23, 1962), 1JA65-67.

Similar to the 1950s, OKC is currently experiencing a severe drought and a municipal water supply shortage that is expected to continue through 2013. *United States Drought Monitor: Oklahoma* (Mar. 12, 2013), http://droughtmonitor.unl.edu/pics/ok_dm.png; *United States Seasonal Drought Outlook* (Feb. 21, 2013) (predicting that the drought in Oklahoma will persist or intensify), http://www.ncdc.noaa.gov/sotc/briefings/201302.pdf. Recently, the federal government designated most of the counties in Oklahoma, including the counties in OKC's service area, as natural disaster areas due to the extreme drought. *USDA Designates 76 Counties in Oklahoma as Primary Natural Disaster Areas with Assistance to Surrounding States*, News Release (Jan. 9, 2013), http://www.fsa.usda.gov/FSA/printapp?fileName=ed_20130109_rel_0014.html&newsType=ednewsrel. OKC's reservoirs located in central Oklahoma are at record low levels and OKC has already taken action to reduce water

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[4] OKC has sought leave to lodge *Water Resources Study I* and *Water Resources Study II* with the Clerk of the Court.

use in its service areas in anticipation of a continuing extreme drought. Steve Lackmeyer, *Oklahoma City Implements Odd/Even Water Rationing*, News OK (Jan. 18, 2013); William Crum, *Water Released From Canton Lake on its Way to Oklahoma City*, News OK (Jan. 30, 2013); William Crum, *Drought Puts Lake Hefner Boating Season in Jeopardy*, News OK (Feb. 5, 2013).

In addition to needing water to meet its short-term water shortages, OKC needs to acquire new sources of water in order to ensure a long-term municipal water supply for its increasing demands. OKC currently serves 580,000 customers and anticipates an annual one and a half percent increase in water usage. *OCWUT Facts*, http://www.okc.gov/waterrights/utilityfacts.html; *Utilities OKC*, http://www.okc.gov/water/index.html (both last visited Mar. 19, 2013). OKC does not have sufficient water supplies for its projected demands and will need an additional 141,000 acre-feet of water supply by 2060. *Regional Raw Water Supply Study for Central Oklahoma*, 2-6 to 2-7 (prepared for Oklahoma Regional Water Utilities Trust) (Mar. 2009). Beginning in 2020, water demands in the OKC area are forecasted to exceed the available water supply. OCWP, *Central Watershed Planning Region Report*, at 50. Surface water use in OKC is forecasted to increase by twenty-six percent from 2010 to 2060. *Id.* at 54. To alleviate the severe short and long-term water supply shortages in central Oklahoma, OKC has acquired water rights in southeastern Oklahoma and the infrastructure necessary to transport that water to OKC.

OKC's Municipal Water Supply in Southeastern Oklahoma

OKC has existing and pending permits to appropriate water from the Kiamichi and Muddy Boggy Rivers, which are tributaries to the Red River located wholly within Oklahoma. *Map of River Basins of the Clear Boggy Creek, Muddy Boggy Creek, and Kiamichi River*, prepared by the City of Oklahoma City Utilities Department (Oct. 3, 2011).[5] OKC has a permit to appropriate 40,000 acre-feet of water per year from the Muddy Boggy River for storage in McGee Creek Reservoir for subsequent municipal and industrial uses. *Permit to Appropriate Stream Water from the Muddy Boggy and Kiamichi Rivers* (approved Jan. 8, 1974). OKC also has a permit to appropriate 91,667 acre-feet of water per year from the Muddy Boggy River for storage in Atoka Lake. *Permit to Appropriate Stream Water from the Muddy Boggy River* (approved Oct. 14, 1980). The water stored in McGee Creek Reservoir and Atoka Lake is transported to OKC and its service area via a 110-mile pipeline.

OKC has a pending application seeking the appropriation of 136,000 acre-feet of water per year from the Kiamichi River for storage in Sardis Reservoir, which is relatively near McGee Creek Reservoir

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[5] OKC has sought leave to lodge the *Map* with the Clerk of the Court.

and Atoka Lake.[6] *Application for a Permit to Use Surface or Stream Water* (filed Mar. 8, 2010). Water stored in Sardis Reservoir will be transported via the 110-mile pipeline to OKC and its service areas for municipal and industrial uses. The water from southeastern Oklahoma is a critical component of OKC's municipal water supply.

OKC's Reliance on the Federal Reservoirs in Southeastern Oklahoma

Prior to Congressional approval, the COE must conduct feasibility and cost-benefit studies of reservoir projects. *See* 33 U.S.C. § 701 (2012); 43 U.S.C. § 390b (2012).[7] Congress initially authorized Hugo Reservoir as part of the flood control plan for the

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[6] In June 2010, OCWUT entered into the Storage Contract Transfer Agreement with Oklahoma to acquire the rights to use the storage capacity in Sardis Reservoir that were previously held by Oklahoma pursuant to a 1974 Contract with the United States.

[7] In the Reclamation Act of 1902, Congress directed the Bureau of Reclamation ("BOR") to develop irrigation supplies through reservoir projects in the western United States. *See* 43 U.S.C. § 371 (2012). Subsequent legislation further authorized the BOR to consider future municipal water demands when studying and constructing reservoir projects. Congress also enacted a series of Flood Control Acts that authorize the COE to construct reservoirs for the primary purpose of flood control. In 1958, Congress enacted the Water Supply Act to include storage for future municipal water needs in any reservoir project constructed by either the COE or the BOR. Water Supply Act of 1958, Pub. L. No. 85-500, 72 Stat. 319 (July 3, 1958); 33 U.S.C. § 701-1; 43 U.S.C. § 390b.

Red River. Flood Control Act of 1946, ch. 596, 60 Stat. 641, 647 (July 24, 1946). Following the initial authorization, the COE completed additional studies to determine how to allocate flood control and water supply storage in Hugo Reservoir and other reservoirs authorized for flood control on the Red River. As part of the modification to Hugo Reservoir, Congress authorized Sardis and Tuskahoma Reservoirs in 1962 for multiple purposes including municipal water supply storage, flood control, and recreation. 1JA65-67 (76 Stat. 1173). Unlike Sardis Reservoir, Tuskahoma Reservoir has not been constructed.

Sardis Reservoir was authorized by Congress "substantially in accordance" with the recommendations from the COE. 1JA66 (76 Stat. at 1187). The COE's findings and recommendations are contained in Senate Document 145, which has the force of federal law. S. Doc. No. 145, 87th Cong., 2d Sess. (Sept. 24, 1962), 1JA106-112. The feasibility studies related to the modification of Hugo Reservoir and the authorization of Sardis and Tuskahoma Reservoirs indicate that the reservoirs were initially considered as a source of municipal water supply for north Texas; however, that area was removed from consideration after further study.[8] *Water Resources Study I*, at 1, 4.

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[8] The feasibility studies for the federal reservoirs in southeastern Oklahoma occurred at the same time that the signatory States were negotiating the terms of the Compact. Congress authorized the States to negotiate a Compact to allocate the water of the Red River in 1955. Pub. L. No. 84-346, 69 Stat. 654, 654 (1955). Feasibility studies for the reservoirs began in 1956 and continued to 1962. 1JA107-108 (S. Doc. No. 145 at 20-21).

Based on a cost-benefit analysis, a study of future municipal demands, and a study of available water supply, the reservoirs were specifically authorized by Congress to primarily provide water to OKC.[9] *See* 1JA108-109 (S. Doc. No. 145 at 21) (concluding that approximately ninety percent of the water supply benefits from Sardis Reservoir would accrue to the OKC metropolitan area, with approximately ten percent of the water supply benefits to be provided for the area near the reservoir within Oklahoma).

Congress based its exclusion of water demands from north Texas on the *Water Resources Study I*, which contains an extensive analysis of the future municipal water demands in the areas surrounding Hugo, Sardis, and Tuskahoma Reservoirs, including OKC and north Texas. Regarding the municipal water demands of north Texas, *Study I* concludes that sufficient water could be obtained from the basins *located in Texas* to satisfy the municipal demands of north Texas. *Water Resources Study I*, at 49.[10] A cost-benefit analysis of using the reservoirs in

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[9] State or local interests are also required to give reasonable assurances that they will contract for storage to satisfy anticipated future demands. 43 U.S.C. § 390b. OKC has provided reasonable assurances for Sardis Reservoir. Storage Contract Transfer Agreement, *supra* note 6. Tarrant has not provided any reasonable assurances for the federal reservoirs located in southeastern Oklahoma.

[10] This finding is consistent with the fact that almost half of the Reach II, Subbasin 5 Red River drainage basin is located in Texas, while only a small portion of that basin is located in Oklahoma. Map of Reach II, Fig. 3, Red River Compact Commission (May 12, 1978), 2JA305 ("*Reach II Map*").

southeastern Oklahoma to supply water to north Texas demonstrates that "[t]he costs of transmission from out-of-basin sources [in southeastern Oklahoma] [is] estimated to be higher than development within the basin." *Id.* In addition, *Study I* finds that water sources within Texas could adequately supply water until the year 2000. While north Texas would need additional water sources after 2000, "such supply could be more advantageously obtained from alternative sources than from the Kiamichi River projects." *Id.* at 4. *Study I* also determines that Sardis Reservoir is located most favorably to provide a municipal water supply for OKC. *Id.* at 5. Accordingly, "[n]o economic value attributable to the study projects for providing storage to meet the demands of the Texas area has been found. It is unlikely that further refinement will alter this conclusion." *Id.* at 1. Thus, *Study I* expressly rejects the water demands of north Texas as a basis for authorizing Sardis, Hugo, and Tuskahoma Reservoirs. *Id.* at 4.

A second study confirmed these findings. *Study II* was prepared to consider streamflow regulation as part of the purpose of the reservoirs in southeastern Oklahoma. *Water Resources Study II*, at 6. *Study II* notes that while the reservoirs could "influence the economy" of northeastern Texas, the OKC area had a "very substantial need for additional water in the future" and concludes that the OKC "metropolitan area is, and will probably continue to be, the largest population center in this study area." *Id.*

OKC's Reliance on the Reach II Allocations

The provisions of the Compact allocating water in Subbasins 1 and 5 of Reach II are relevant to OKC's municipal water supply and Tarrant's claims. The general purpose of the Compact is to allocate water from the Red River and its tributaries between Arkansas, Louisiana, Oklahoma, and Texas by dividing the Red River Basin into reaches and subbasins within each reach. Pub. L. No. 96-564, 94 Stat. 3305 (1980), 1JA7-51. The Compact recognizes each State's unrestricted authority to regulate within its boundaries "the appropriation, use, and control of water . . . " 1JA12 (§ 2.10(a)). In addition, the Compact expressly recognizes Oklahoma's "free and unrestricted use of the water" of all the tributaries of the Red River located wholly in Oklahoma. 1JA23-24 (§ 5.03(b)). Each State "may use the water allocated to it by this Compact in any manner deemed beneficial by that [S]tate." 1JA10 (§ 2.01).

Reach II is divided by the Compact into five subbasins. With the exception of Subbasin 5, the Compact allocates water based on State boundaries. Subbasin 1 "includes those streams and their tributaries above existing, authorized or proposed last downstream major damsites, wholly in Oklahoma and flowing into Red River below Denison Dam above the Oklahoma-Arkansas [S]tate boundary." 1JA22 (§ 5.01(a)). Oklahoma is apportioned the water in Subbasin 1 and has "unrestricted use" of that water. *Id.* (§ 5.01(b)).

Subbasin 5 includes the main stem of the Red River and its tributaries "from Denison Dam down to the Arkansas-Louisiana [S]tate boundary, excluding all tributaries included in the other four subbasins of Reach II." 1JA24-25 (§ 5.05(a)). The northern boundary of Subbasin 5 extends into Oklahoma. The northern boundary ends at the downstream points of the damsites in southeastern Oklahoma, including the Hugo Reservoir damsite. *Reach II Map, supra* note 10. The approximate drainage area of Subbasin 5 is 1485 square miles in Texas and 858 square miles in Oklahoma. *Id.*

When the flow of the Red River at the Arkansas-Louisiana State line is 3000 cubic feet per second (cfs) or more, the States have equal rights to the use of water originating in or flowing into Subbasin 5; provided, however, that States may only use water located within their boundaries, and no State may use an amount of water that exceeds twenty-five percent of the total amount of excess water that is available throughout Subbasin 5. 1JA25 (§ 5.05(b)(1)). The Compact requires each *State* to regulate its water resources to ensure that Louisiana receives its allocation of Subbasin 5 water. *Id.* (§ 5.05(b)(2)). The purpose of Subbasin 5 is to ensure that the upstream States cooperate to deliver reliable flows to Arkansas and Louisiana. *Supplemental Interpretative Comments of the Legal Advisory Committee*, 1JA27-31 (explaining that "[u]pstream [S]tates never questioned that Louisiana needed and is entitled to water;" that the purpose of Subbasin 5 is for "upstream [S]tates [to]

cooperate in assuring reliable flows to Arkansas and Louisiana;" and that Subbasin 5 governs low flow obligations of the States).

SUMMARY OF ARGUMENT

Surface water has long been recognized, by both this Court and Congress, as an important resource that is within the States' plenary authority to allocate and regulate. Congress has delegated to each State the exclusive authority to determine, allocate, and regulate their internal surface water resources. In 1866, Congress expressly recognized the plenary control of the States over their internal water resources. Since 1866, Congress has repeatedly enacted legislation that affirmed its delegation of plenary authority to the States. Subject only to a few limited exceptions, Congress has granted States the plenary authority over surface water resources within their boundaries.

The terms of the Compact do not authorize Tarrant to ignore Oklahoma's plenary authority and access its Reach II, Subbasin 5 allocation from Oklahoma. Tarrant's claim is premised on its erroneous contention that Congress authorized north Texas entities to use water stored in federal reservoirs in Subbasin 1 that is subsequently released to Subbasin 5. Congress never intended, authorized, or funded the federal reservoirs to provide a water supply to north Texas.

A dormant Commerce Clause analysis cannot be used to limit the scope of the plenary authority over surface water resources expressly delegated to the States by Congress. Oklahoma's statutes regulating the export of surface water are consistent with its plenary authority. Because Congress has acted, the dormant Commerce Clause does not apply and cannot be used to invalidate Oklahoma's statutes. This Court has never used a dormant Commerce Clause analysis to define or limit the scope of plenary authority expressly delegated to the States by Congress, and it should not do so in this case.

Tarrant broadly cites *Sporhase v. Nebraska* to support its argument that Oklahoma's statutes violate the dormant Commerce Clause. However, Tarrant disregards the legally and factually distinct issues between the unappropriated surface water at issue in this case and the ground water at issue in *Sporhase*. The only issue presented to the Court in *Sporhase* was whether the existence of the Commerce Clause of the Constitution alone, in the absence of any action by Congress, would invalidate Nebraska's statutes regarding the export of ground water to other States. The *Sporhase* decision does not preclude States from allocating and regulating surface waters in accordance with Congress's express delegation of that authority to the States.

ARGUMENT

I. Congress Has Expressly Delegated Plenary Authority Over Surface Water Resources to the States.

A. Plenary authority over surface water is an incidence of federal sovereignty that must be conveyed by Congress.

Prior to the creation of the States, a large area of the western United States was claimed by Spain. Much of this area was ceded by Spain to France in the Treaty of San Ildefonso. 55 Consol. T.S. 377 (Oct. 1, 1800). Within three years of the area's cession, France ceded the area to the United States in the Louisiana Purchase. Treaty of 1803, 8 Stat. 202 (Apr. 30, 1803). The Louisiana Purchase encompassed over five hundred million acres of land in what are now fourteen States, including Oklahoma. France ceded "to the United States in the name of the French Republic for ever and in full Sovereignty the said territory with all its rights and appurtenances as fully and in the same manner as they have been acquired by the French Republic [from Spain]." *Id.* at art. I.

The Louisiana Purchase granted the United States complete sovereignty over those lands and water. Control over water resources is closely connected to the sovereign powers of the government. *United States v. Oregon*, 295 U.S. 1, 14 (1935). As part of its sovereignty, Congress has the exclusive power to regulate water resources and to delegate that authority to the States. *See Kansas v. Colorado*,

206 U.S. 46, 85 (1907) ("[I]f the nation has the right to regulate the flow of the waters, we must inquire what it has done in the way of regulation.").

B. Congress has expressly conveyed its sovereignty over surface water resources to the States.

Throughout the 1800s, Congress enacted a series of statutes designed to encourage settlement in the west by providing incentives to develop and reclaim land through local irrigation projects. *California v. United States*, 438 U.S. 645, 648-50 (1978). *See, e.g.*, Homestead Act of May 20, 1862, ch. 75, 12 Stat. 392 (opening the public domain in the western United States to homesteading). Prior to 1866, the right to beneficially use water was regulated by local rules and customs. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154 (1935). This policy of regulating and allocating water in accordance with local rules and customs "was approved by the silent acquiescence of the federal government, until it received formal confirmation at the hands of Congress by the Act of 1866." *Id.*

In 1866, Congress passed the Mining Act to expressly confirm the federal policy of deferring to State sovereignty in the determination and allocation of water resources within State boundaries. Mining Act of July 26, 1866, ch. 262, 14 Stat. 251, 253 (*currently codified at* 30 U.S.C. § 51 (2012)). The purpose of the Mining Act was not to federalize State water

law, but instead was to affirmatively acknowledge the federal government's acceptance of "the validity of the local customs, laws, and decisions of courts in respect to the appropriation of water." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 704 (1899).

In 1877, Congress passed the Desert Lands Act in order to sever water from lands in the public domain. Desert Lands Act of March 3, 1877, ch. 107, 19 Stat. 377 (*currently codified at* 43 U.S.C. §§ 321 to 323, 325, 327 to 329 (2012)). While Oklahoma was not listed as a State to which the Desert Lands Act applied, this Court has stated that

> following the act of 1877, *if not before*, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated [S]tates, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain.

Beaver Portland, 295 U.S. at 163-64 (emphasis added); 35 Cong. Rec. 6675, 6679 (June 12, 1902) (statement of Rep. Mondell) ("Every act since that of April 26, 1866, has recognized local laws and customs appertaining to the appropriation and distribution of water . . . and it has been deemed wise to continue our policy in this regard."). Similarly in 1891, Congress passed an act that stated: "the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes

under authority of the respective States or Territories" in order to eliminate "the possibility of any question being raised as to the right of the States and Territories to regulate and control the management and the price of water." Timber-Culture Act of March 3, 1891, ch. 561, 26 Stat. 1095 (*currently codified at* 43 U.S.C. § 946 (2012)); 29 Cong. Rec. 1947, 1952 (Feb. 17, 1897) (statement of Rep. Lacey).

As States were admitted to the Union, Congress granted the newly created States total authority to control the waters located within their boundaries. *California*, 438 U.S. at 662-64. The sovereignty over water retained by the United States was expressly delegated to the western States "on an equal footing with the original States." Enabling Act of June 16, 1906, 34 Stat. 267, 271; *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 87 (1922) ("Oklahoma when she came into the Union took sovereignty over the public lands in the condition of ownership as they were then. . . ."). The full powers of local sovereignty granted to the States included the power to allocate and regulate internal surface waters. *Kansas,* 206 U.S. at 92-94. *See also Alden v. Maine*, 527 U.S. 706, 714 (1999) (explaining that the United States Constitution recognizes the States as sovereigns by reserving "to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status"); *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 779 (1991)

("[T]he States entered the federal system with their sovereignty intact").

When Congress enacted the Reclamation Act, it had already expressly delegated plenary authority over intrastate water to the States. *California,* 438 U.S. at 663-64. The Reclamation Act provided that all money received from the sale and disposal of public lands in Oklahoma, as well as other arid States, would be used in the "examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands. . . ." Reclamation Act of June 17, 1902, ch. 1093, 32 Stat. 388 (*currently codified at* 43 U.S.C. § 391 (2012)). Section 8 of the Reclamation Act provides that "nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation. . . ." 43 U.S.C. § 383. By enacting the Reclamation Act, Congress intended to continue its delegation of plenary authority to the States over the appropriation and distribution of water. 35 Cong. Rec. at 6679.

A key component of all the Acts passed by Congress from 1862 to 1902 is the delegation of plenary authority to the States to allocate and regulate their internal surface water resources. *California*, 438 U.S. at 656 ("Because of the fear that these Acts might in

some way interfere with the water rights and systems that had grown up under [S]tate and local law, Congress explicitly recognized and acknowledged the local law").[11] Thus, each State has the plenary authority to determine how to allocate and regulate its surface water resources. *Kansas*, 206 U.S. at 94 (stating that each State "may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control"). Because the authority over water resources has been delegated to the States, the federal government cannot force a State to regulate its internal water resources in a certain way. *Beaver Portland*, 295 U.S. at 165; *Rio Grande Dam*, 174 U.S. at 703-05.

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[11] Given the lack of knowledge about ground water at the time, the Acts passed by Congress from 1862 to 1902 do not expressly reference ground water. However, as described above, the Acts reference control over flowing streams and the prior appropriation and riparian doctrines governing surface water allocations. *See, e.g.*, 35 Cong. Rec. at 6675-77 (summarizing the events preceding the Reclamation Act and discussing the necessity of States controlling streams). Prior to the relatively recent enactments of ground water statutes, most States, including Oklahoma, followed the common law doctrine that the overlying land owner had a right to the ground water underlying the land. Wells A. Hutchins, *Trends in the Statutory Law of Ground Water in the Western States*, 34 Tex. L. 157, 166 (Dec. 1955).

Since passing the Reclamation Act, Congress has continued its express delegation of plenary authority over surface water to the States. The policies underlying the enactment of the McCarran Amendment are a relatively recent example of continued Congressional delegation of authority over surface water to the States. As part of the debate regarding the McCarran Amendment, the Senate recognized the clear plenary authority of States over water within their boundaries and concluded that every water user, including the United States "must be amenable to the law of the State." S. Rep. No. 755, 82d Cong., 1st Sess., 6 (1951).[12]

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[12] Congress and this Court have defined limitations on the States' plenary authority over their internal water resources with respect to the reserved rights of the United States, the navigable servitude, and the doctrine of equitable apportionment for interstate streams. *See Rio Grande Dam*, 174 U.S. at 703; *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938); *Kansas*, 206 U.S. at 100-01. These limitations are not relevant to the case before this Court.

II. The Express Terms of the Red River Compact Do Not Authorize Tarrant to Ignore the Authorizing Legislation for the Federal Reservoirs in Reach II, to Access its Reach II Subbasin 5 Allocation from Oklahoma, or to Ignore Oklahoma's Plenary Authority Over Water Resources.

A. Congress funded and authorized the federal reservoirs in Reach II for OKC and southeastern Oklahoma.

Tarrant's incorrect assumption that the Compact drafters intended for Texas entities to access water that flowed downstream from the federal reservoirs in Subbasin 1 is contrary to Congress's intent, the terms of the Compact, and Oklahoma's plenary authority. Tarrant notes that the COE considered the feasibility of using Sardis Reservoir in conjunction with Hugo and Tuskahoma Reservoirs to provide north Texas with a municipal water supply. Pet'r's Br. 11-12. However, Tarrant fails to explain or reference the extensive analysis relied on by the COE to conclude that it was not necessary, feasible, or cost effective to use water from Hugo, Sardis, or Tuskahoma Reservoirs to satisfy north Texas's municipal demands.[13] The COE expressly rejected the use of the

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[13] Several *amici* also fail to cite the COE's rejection of north Texas's municipal water demands as a basis for authorizing the federal reservoirs in southeastern Oklahoma and premise their reading of the Compact on their erroneous interpretation of the federal authorizing legislation. Brief of City of Dallas, at 8-11; Brief of Upper Trinity Regional Water District, at 23.

reservoirs as a source of municipal water supply in north Texas. *Water Resources Study I*, at 4.

Congress authorized and funded reservoirs in Reach II, Subbasin 1 for the primary purpose of providing OKC with a future municipal water supply. OKC and southeastern Oklahoma, not Tarrant, are the intended beneficiaries of the federal reservoirs. Allowing Tarrant or other north Texas entities to access the water from the federal reservoirs in Subbasin 1 violates the federal authorizing legislation for Sardis Reservoir, as well as the Compact.[14] 1JA10 (§ 2.02) (stating that the use of water in connection with any federal water project must be in accordance with the Act authorizing that project). Tarrant has failed to show any connection between the federally authorized reservoir projects in southeastern Oklahoma and its municipal water demands in north Texas. *Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d 1222, 1245-46 (10th Cir. 2011). As authorized by Congress, OKC is acquiring water rights in Sardis Reservoir for its municipal water supply in accordance with Oklahoma water laws.

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[14] *Amici* also urge the Court to ignore the authorizing legislation for the federal reservoirs in southeastern Oklahoma and adopt an even broader interpretation of the Compact to allow north Texas entities to access water from the Kiamichi River in Reach II, Subbasin 1. Brief of City of Irving, Texas, City of Hugo, Oklahoma, and Hugo Municipal Authority, at 25-27; Brief of North Texas Municipal Water District, at 9; Brief of North Texas Commission, at 4.

B. The Compact does not authorize Tarrant to access its Subbasin 5 allocation within Oklahoma in disregard of Oklahoma's plenary authority over its internal surface water.

Subbasin 5 encompasses portions of Oklahoma, Texas, and Arkansas in order to divide the total amount of excess water originating in the basin between the States. The boundaries of Subbasin 5 encompass all of the boundaries of the signatory States in order to cover the main stem of the Red River and its drainage areas. *Reach II Map*, 2JA305. In the context of Subbasin 5, Texas is an upstream State with downstream delivery obligations. After extensively analyzing the provisions regarding Subbasin 5 in the Compact, the Tenth Circuit correctly concluded that "[t]aken together, the provisions of § 5.05 stand for the principle that the upstream States control the water within their boundaries, provided they meet their minimum flow obligations to downstream [S]tates and do not take more than an equal share of the excess water." *Tarrant*, 656 F.3d at 1244. Subbasin 5 is designed to ensure that each State regulates its water resources to ensure that a certain flow in the main stem of the Red River reaches the downstream States.

Tarrant interprets Subbasin 5 in isolation as a license that allows it and other north Texas entities to ignore Oklahoma's statutes and access water within Oklahoma's boundaries. If Tarrant is correct and any State can access excess Subbasin 5 water without

regard for the other States' plenary authority, it would be impossible for each State to regulate Subbasin 5 water to ensure compliance with the downstream delivery obligations as required by terms of the Compact. Under Tarrant's logic, State boundaries would not be relevant to determine the delivery obligations and those obligations could be satisfied by any State anywhere in Subbasin 5. Similarly, Tarrant fails to explain how the limitation prohibiting any State from using more than twenty-five percent of excess water will be enforced if State boundaries are ignored and that water can be obtained anywhere by any State.

Interpreting the Compact to allow each State the use of excess water from Subbasin 5 that is within its boundaries when the flow of the Red River at the Arkansas-Louisiana State line is 3000 cfs or more, and precluding any State from using more than twenty-five percent of the total excess, ensures that all States have equal rights to excess water originating in Subbasin 5.[15] Despite Tarrant's arguments, the provisions of the Compact concerning Subbasin 5 operate to protect Texas in a manner that still respects State boundaries. The twenty-five percent provision of Section 5.05(b)(1) operates as a limitation to prevent water-long States from using an

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[15] Tarrant emphasizes that the main stem of the Red River does not flow into Louisiana. However, Louisiana is ensured its allocation of water by the delivery requirements imposed on the upstream States.

excess amount of the Subbasin 5 water that is within their boundaries, not to give water-short States an entitlement to ignore State lines and raid nearby States to offset the limited physical supply that may at times exist within their boundaries.[16] Scarcity does not entitle a State to a presumption of access into another State under an interstate compact that is otherwise silent on the issue.

The Compact must be read in light of Oklahoma's exclusive authority to regulate its internal surface waters, which include the Kiamichi and Muddy Boggy Rivers in Subbasins 1 and 5. The general policies and express terms of the Compact confirm Congress's delegation of plenary authority over water resources to the States. Tarrant argues that the language of the Compact at Sections 2.01 and 2.10 deferring to State water laws is "boilerplate" and "generic language that appears in almost every interstate compact." Pet'r's Br. 10, 38. The more reasonable interpretation is that the insertion of this language into "almost every interstate compact" reflects the importance of State plenary authority over water resources.

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[16] Hypothetically, suppose the flow of the Red River at the Arkansas-Louisiana State line is 4000 cfs, resulting in a total net amount of excess flow of 1000 cfs in Subbasin 5. Suppose further that the Subbasin 5 flows are 400 cfs in Arkansas, 400 cfs in Oklahoma, and 200 cfs in Texas. Texas would be entitled to use all of its Subbasin 5 flows, whereas Arkansas and Oklahoma would be required to limit their use of water to 250 cfs each, subject to additional rebalancing between them and Louisiana.

The Tenth Circuit concluded that the "Compact explicitly defers to and recognizes plenary [S]tate authority over water use. . . ." *Tarrant*, 656 F.3d at 1237. Moreover, the Compact "plainly indicates that the [S]tate is not limited in how it uses its apportioned water." *Id.* at 1238. The Tenth Circuit's analysis is consistent with the plenary authority delegated to Oklahoma by Congress to allocate and regulate internal surface water resources. Nothing in the Compact restricts or preempts Oklahoma's plenary authority. In an exercise of the plenary authority granted by Congress and confirmed by the Compact, Oklahoma has enacted statutes regarding the allocation and regulation of surface water resources within its boundaries. Those statutes do not deprive Tarrant of its Compact allocation of water or prohibit out-of-State water users from appropriating water from Oklahoma. Rather, the statutes regulate the allocation of Oklahoma's internal surface water resources in a way that is consistent with the Compact and its plenary authority.

III. The Dormant Commerce Clause Does Not Apply When Congress Has Taken Action to Allow States to Exercise Plenary Authority Over Surface Water Resources.

A. Congress has taken action to allow States to exercise plenary authority over surface water resources.

The Commerce Clause provides that "Congress shall have Power . . . To regulate Commerce . . .

among the several States . . . " U.S. Const. art. I, § 8, cl. 1, 3. The original purpose of the Commerce Clause was to give Congress the express authority to regulate interstate commerce to address the conflict of commercial regulations adopted by each State under the Articles of Confederation. *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979). "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Gibbons v. Ogden*, 22 U.S. 1, 231 (1824).

While the Commerce Clause expressly authorizes Congress to regulate interstate commerce, this Court has interpreted the Clause as an implied restriction on permissible State regulation. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949). The dormant aspect of the Commerce Clause only applies when Congress has not taken any action or is silent regarding interstate commerce. *Hughes*, 441 U.S. at 326 (discussing cases that define the scope of permissible State regulation in areas of *congressional silence*). When Congress acts, the courts are not free to review State regulations under the dormant Commerce Clause. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154-55 (1982). "When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce. . . ." *Id.* at 154. Accordingly, the dormant Commerce Clause operates to ensure the continuance of "the policy of uniformity, embodied in the Commerce

Clause, which presumptively prevails when the Federal Government has remained *silent*." *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 8 (1986) (emphasis added).

The dormant Commerce Clause does not preclude Congress from acting to delegate plenary authority to the States. Likewise, the dormant Commerce Clause "is not a roving license for federal courts to decide what activities are appropriate for [S]tate and local government to undertake. . . ." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Authority*, 550 U.S. 330, 343 (2007). This is especially true when dealing with areas that States have traditional and primary power to regulate, such as the use of surface water. *See Rapanos v. United States,* 547 U.S. 715, 738 (2006). The dormant Commerce Clause does not give federal courts the responsibility for policy judgments regarding areas of State plenary authority when Congress has acted. *United Haulers*, 550 U.S. at 344-45.

The application of the dormant Commerce Clause to Oklahoma's allocation and regulation of its internal surface water resources would ignore Congress's express delegation of plenary authority over surface water resources to the States. Beginning in the 1860s, Congress acted to grant the States authority to regulate and allocate their surface water resources – first by acquiescence and then by express approval. *Beaver Portland*, 295 U.S. at 154. Congress is entitled to "its wisdom to act to permit the States varying degrees of regulatory authority." *Wardair*, 477 U.S. at

12. To apply the dormant Commerce Clause analysis where Congress has acted, and to apply that analysis to reverse the policy that Congress has decided to follow would "turn dormant Commerce Clause analysis entirely upside down." *Id.* ("For the dormant Commerce Clause . . . only operates where the Federal Government has not spoken to ensure that the essential attributes of nationhood will not be jeopardized by States acting as independent economic actors.").

Tarrant relies on the dormant Commerce Clause as a way to create a right to water in Oklahoma and to avoid Oklahoma's applicable statutes regarding surface water appropriations. Because Congress has acted to delegate authority over surface water resources to the States and the dormant Commerce Clause analysis does not apply, the relevant inquiry is whether Oklahoma's statutes are a valid exercise of its plenary authority over surface water resources.[17]

B. The Compact and Oklahoma's statutes are consistent with the plenary authority delegated to the States by Congress and recognized by this Court.

Congress expressly delegated authority over surface water resources to the States limited only by

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[17] The Respondents have extensively cited to and briefed the validity of the provisions of Oklahoma statutes and OKC does not repeat that discussion here, except to note that it agrees with the Respondents' position.

reserved rights, the navigation servitude, and equitable apportionment. The Compact does not demonstrate Congressional intent to alter its express grant of plenary authority to the States. On the contrary, the Compact explicitly recognizes and affirms Congress's delegation of plenary authority over surface water to the States. While the Compact allocates the Red River and its tributaries between the signatory States, it also provides that the States are free to regulate and allocate their internal water resources. Oklahoma's statutes regulate the water resources within its boundaries, do not prevent Tarrant from accessing Texas's Compact allocation, and are consistent with the Compact and the plenary authority delegated by Congress to the States.

Allowing Tarrant to access Oklahoma's internal surface water resources in disregard of the statutory provisions governing that water "would result in a significant impingement of the States' traditional and primary power over land and water use." *Solid Waste Agency of N. Cook Cnty. v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). The Compact does not authorize the signatory States to cross State boundaries and access each other's internal water resources without complying with the applicable statutory provisions governing the regulation and allocation of that water. Despite the express delegation of authority by Congress and the clear language of the Compact, Tarrant cites to one provision, Section 5.05(b)(1), as conclusive proof that over one hundred years of State authority over surface water

resources should be ignored and that it is entitled to appropriate water in complete disregard of Oklahoma's plenary authority. Consistent with its plenary authority, Oklahoma has made policy choices regarding its internal water resources. It defies logic to interpret one provision in the Compact as proof that Congress intended to displace Oklahoma's policy choices.

IV. *Sporhase* Does Not Support the Proposition that the Dormant Commerce Clause Precludes States From Allocating and Regulating Surface Water Within Their Boundaries.

A. The States' authority over ground water is distinct from Congress's express delegation of plenary authority over surface water to the States.

Tarrant broadly cites *Sporhase v. Nebraska* to support its argument that Oklahoma's statutes violate the dormant Commerce Clause. 458 U.S. 941 (1982). While the only issue in *Sporhase* involved ground water, the Court broadly stated that "water is an article of commerce." *Id.* at 954. Although it is not clear whether the Court held that all water is an article of commerce or that ground water is an article of commerce, it is clear that Congress has not *expressly* delegated plenary authority over ground water to

the States.[18] When Congress has not acted, States can regulate natural resources, such as ground water. As determined by the Court in *Sporhase*, the regulation of a resource that Congress is silent about is limited by the dormant Commerce Clause. *Id.* In contrast, when Congress has acted by delegating plenary authority to the States to allocate and regulate internal surface water resources, the dormant Commerce Clause does not apply because the limits on the scope of the authority have already been determined. In this case, the dormant Commerce Clause cannot be applied to invalidate Oklahoma's statutes regarding the export of surface waters in light of over one hundred years of Congressional action regarding the States' authority to allocate and regulate surface waters within their boundaries.

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[18] In the context of determining Colorado's authority to regulate ground water, the Colorado Supreme Court recognized that Congress made no distinction between tributary and nontributary water when delegating plenary authority to the States. *Chatfield East Well Co., Ltd. v. Chatfield East Property Owners Ass'n*, 956 P.2d 1260, 1269 (Colo. 1998); *Bayou Land Co. v. Talley*, 924 P.2d 136, 145-50 (Colo. 1996). While Congress did not specifically refer to ground water, it is clear that Congress specifically contemplated waters tributary to the natural streams and expressly referenced surface waters. *See supra* note 11. Neither Colorado case involved a dormant Commerce Clause challenge. Since ground water is not involved in this case, it is not necessary to address whether Congress granted plenary authority over ground water to the States as part of its express grant of plenary authority over surface water.

Sporhase did not discuss whether the States' plenary authority over surface water resources would change its application of the dormant Commerce Clause analysis. As part of reaching the conclusion that water is an article of commerce, the Court was concerned with Nebraska's claim that ground water was not an article of commerce because that would result in "curtail[ing] the affirmative power of Congress to implement its own policies concerning such regulation." *Id.* at 953. This concern does not exist when Congress has exercised its affirmative power to implement policies, such as delegating the authority to allocate and regulate surface water resources to the States.

Nebraska argued that "Congress has authorized the States to impose otherwise impermissible burdens on interstate commerce *in ground water*." *Id.* at 958 (emphasis added). In support of its argument, Nebraska referenced several statutes, including the Reclamation Act, and numerous interstate compacts that dealt with Congress's delegation of plenary authority over *surface water*. *Id.* at 959. The Court rejected Nebraska's argument and stated that

> the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress

> consented to the unilateral imposition of unreasonable burdens on commerce.

Id. at 960. The Court's statement must be considered in the context of the issue before the Court – whether Nebraska's statutes regarding ground water were insulated from dormant Commerce Clause scrutiny. As noted by the Court, citations to interstate compacts and federal statutes that address the States' plenary authority over surface water resources do not lead to the conclusion that Congress has acted with regard to ground water, or that statutes regulating ground water have been removed from dormant Commerce Clause scrutiny.[19] In light of Congressional silence on ground water, Nebraska enacted statutes regulating ground water and the Court properly analyzed whether those statutes violated the dormant Commerce Clause.

The issue before this Court is whether Oklahoma's statutes are consistent with the constraints imposed by Congress and this Court on the States' plenary authority over their internal surface water resources. Oklahoma's statutes seek to regulate the export of its internal unappropriated surface water.

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[19] The Court even acknowledged the States' plenary authority over surface water resources by noting that there is "the legal expectation that under certain circumstances each State may restrict water within its borders has been fostered over the years not only by our equitable apportionment decrees, but also by the negotiation and enforcement of interstate compacts." *Sporhase*, 458 U.S. at 956.

The statutes do not violate the terms of the Compact and are within the scope of the authority delegated to the States by Congress.

Moreover, this case is factually distinguishable from *Sporhase*. The water in Reach II is the subject of a Congressionally approved interstate compact that allocates surface water between several States. The ground water involved in *Sporhase* had never been allocated between States and was not the subject of an interstate compact. The overlying land owners in *Sporhase* appropriated the water for beneficial irrigation use on their land based on their land ownership. The Reach II, Subbasin 5 water involved in this case remains unappropriated surface water that cannot be allocated based on land ownership.

B. *Sporhase* overruled the public ownership theory, but did not address the States' plenary authority over surface water resources.

Historically, States operated under the assumption that they owned natural resources and could thus insulate those resources from a dormant Commerce Clause challenge. *See* Richard S. Harnsberger, et al., *Interstate Transfers of Water: State Options After Sporhase*, 70 Neb. L. Rev. 754, 759 (1991). Wild animals and water were not viewed as articles of commerce because they were owned by the State in common ownership for the benefit of its citizens. *Geer v. Connecticut*, 161 U.S. 519, 529 (1896); *Hudson*

County Water Co. v. McCarter, 209 U.S. 349, 354-58 (1908) (both explaining that the negative community of property, which includes air, water, and wild animals, could never be reduced to private ownership).

A few years prior to the *Sporhase* decision, the Court rejected the public ownership doctrine as a way to insulate statutes from the dormant Commerce Clause. *Hughes*, 441 U.S. at 334-35. In overruling the public ownership theory, the Court in *Sporhase* noted that the rationale underlying the theory still existed but had been recast as a "fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Sporhase*, 458 U.S. at 951 (internal quotations and citations omitted).

Public ownership is distinct from a State's exercise of delegated plenary authority over those resources. Under the public ownership theory, a State could define ownership, allow the resource to be the subject of intrastate commerce, and then preclude interstate commerce. On the other hand, exercising plenary authority over surface water resources, subject to the limitations by Congress and this Court, gives the States the authority to allocate and regulate a resource. The exercise of plenary authority over a resource does not involve a State's action as a property owner. Rather, the State acts as a sovereign with the delegated power to regulate the resource. "The [S]tate is without authority to transfer one man's property to another, but its power to control unappropriated public waters is plenary." *Oklahoma Water Res. Bd. v.*

Cent. Oklahoma Master Conservancy Dist., 464 P.2d 748, 753 (Okla. 1968).

Overruling the public ownership theory is distinct from a determination that States cannot exercise plenary authority over their internal water resources. "Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution." *Hughes*, 441 U.S. at 335. Here, Oklahoma has exercised its plenary authority consistent with the power delegated to it by Congress, the federal authorizing legislation for the reservoirs in southeastern Oklahoma, the Compact, and the Constitution.

CONCLUSION

For all of the reasons stated above, the judgment of the Tenth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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A Texas State Agency,

Petitioner,

v.

RUDOLF JOHN HERRMANN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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INTEREST OF AMICUS CURIAE

Amicus Curiae, the Oklahoma Independent Petroleum Association, files this brief in support of the Respondents, members of the Oklahoma Water Resources Board and the Oklahoma Water Conservation Storage Commission (collectively, "Oklahoma"). The Association is a non-profit organization comprised of more than 2,000 members, including independent oil and natural gas producers, drilling contractors, service and supply company owners and managers, mineral owners, attorneys, and accountants.[1] This case is important to the Association and its members because it threatens to undermine the State of Oklahoma's regulatory programs designed to protect Oklahoma's limited water resources. The Association's members depend on reliable supplies of water to conduct their businesses and, like millions of other citizens of Oklahoma, they depend on the State to carefully regulate and protect these critical resources.

Oklahoma is a major producer of oil and gas, with active oil and gas wells in 71 of Oklahoma's 77 counties. Indep. Petroleum Ass'n of Am., *The Oil &*

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[1] This brief is filed with the consent of both parties, which consents are on file with the Clerk of this Court. Pursuant to Rule 37.6 of the Rules of the Supreme Court, the Association discloses that no counsel for either party in this case authored any portion of this amicus brief, nor did any such counsel or party make any monetary contribution intended to fund the preparation or submission of this brief. No persons other than the Association made any such monetary contribution.

Gas Producing Industry in Your State, 84 (October 29, 2012), *available at* http://www.ipaa.org;wp-content/uploads/downloads/2012/12/2011-2012OilGas-Producing IndustryinYourState.pdf. Oil production in Oklahoma began in 1891, and Oklahoma has been a leading producer of oil and gas ever since. *Id.*

Both production and refining of oil require substantial amounts of water. Water is required to produce crude oil, especially in mature oil fields such as those in Oklahoma. According to the U.S. Department of Energy, "[a]s oil wells age, enhanced recovery techniques are used to extract additional oil. Many of these recovery techniques involve injection of water or steam into the well, and some are very water-intensive." U.S. Dept. of Energy, *Energy Demands on Water Resources*, 21 (December 2006). Likewise, substantial amounts of water are required to refine crude oil into petroleum products. The U.S. Department of Energy reports that "[r]efinery use of water for processing and cooling is about 1 to 2.5 gallons of water for every gallon of [petroleum] product." *Id.* at 20.

Water needs in the Oil & Gas sector in Oklahoma are substantial and are expected to increase in the future. The Oklahoma Water Resources Board predicts that water demands for oil and gas production in Oklahoma will more than double in the next fifty years. Okla. Water Res. Bd., *Oklahoma Comprehensive Water Plan*, Exec. Report, 62 (Feb. 2012). Similarly, growing quantities of water will be required for refining crude oil into petroleum products. *Id.* According to the Oklahoma Comprehensive Water Plan, the

Oil & Gas sector will experience the highest water demand growth rate of any sector in the state.

Of course, these are not the only water demands in Oklahoma. Large and growing amounts of water are used for agriculture, power production, municipal deliveries, industrial operations, and domestic needs throughout the State. These uses are also expected to increase substantially over the next fifty years, collectively growing by approximately 33% during that time. *Id.* By 2060, the Oklahoma Comprehensive Water Plan anticipates significant gaps between available surface water supplies and expected demand in more than two-thirds of the surface water basins in the State. *Id.* at 4.

In the face of these growing demands, Oklahoma is also contending with a severe statewide drought. Recently, the United States Department of Agriculture declared 76 of Oklahoma's 77 counties to be "primary natural disaster areas due to damage and losses caused by the recent drought." News Release, U.S. Dept. of Agric., *USDA Designates 76 Counties in Oklahoma as Primary Natural Disaster Areas* (Jan. 14, 2013). This drought has been unrelenting in Oklahoma and is now extending into a third consecutive year. William Crum, *Long-Range Forecasts Predict Dry, Hot Summer for Oklahoma*, NewsOK, Mar. 12, 2013, *available at* http://newsok.com/long-range-forecasts-predict-dry-hot-summer-for-oklahoma/article/3764848 (last visited Mar. 16, 2013). Long-range forecasts, moreover, predict that Oklahoma's precipitation deficit will be worse this summer "than anywhere else in

the country." *Id.* Clearly, Oklahoma's circumstances are no less dire than those described by the Petitioner in this case. *See* Pet. Br. 13-14.

Because the Oklahoma Independent Petroleum Association and its members, like all Oklahomans, depend on reliable supplies of water, particularly in the midst of extended droughts, the Association submits this brief in an effort to impress upon the Court the critical nature of the issue before it. A ruling in favor of the Petitioner would undermine the State of Oklahoma's statutory authority to regulate and manage the State's precious water supplies. Because such a ruling would be an unprecedented intrusion into a subject that is not only of critical importance to Oklahoma, but also historically has been within the exclusive province of each individual State, the Association urges the Court to uphold the ruling of the Tenth Circuit and reject the Petitioner's arguments to the contrary.

SUMMARY OF ARGUMENT

The Petitioner, Tarrant Regional Water District ("Tarrant"), seeks relief in this Court from a decision by the Tenth Circuit Court of Appeals, *Tarrant Reg'l Water Dist. v. Herrmann, et al.*, 656 F.3d 1222 (10th Cir. 2011). Specifically, Tarrant asks this Court to invalidate several statutory enactments of the State of Oklahoma. These statutes are part of Oklahoma's carefully constructed and long-standing body of water

laws – all of which are designed to protect, enhance, and ensure the long term viability of Oklahoma's water resources. *See*, *e.g.*, Okla. Stat. tit. 82, § 105.1A ("the purpose of Section 105.1 through 105.32 of this title is to provide for stability and certainty in water rights. . . .").

Although Tarrant bases its arguments on an interpretation of the Red River Compact, Tarrant *has not* asserted that Oklahoma is violating any of its express obligations under the Compact, including the obligation to limit the amount of its diversions from Reach II, Subbasin 5 of the Red River Basin. Because no such violations have been alleged, that should be the end of this dispute. Instead, however, Tarrant asserts that certain statutory provisions adopted by the Oklahoma Legislature are inconsistent with Tarrant's interpretation of the Compact.

This Court has long provided great deference to the States in their respective enactments of statutory schemes for regulating and managing water resources. The Court should continue to do so here by rejecting Tarrant's attempt to read into the Red River Compact an asserted right that cannot be found in the text of the Compact – a right to reach into another state and appropriate water there for use in Tarrant's home State of Texas. No such right exists in the Compact, nor does Tarrant cite a single example from any of the approximately 22 other interstate compacts in the United States where such a right has been impliedly conferred on a downstream compacting State. Consistent with numerous precedents of

this Court, Tarrant's attempt to insert such a right in the Red River Compact should be rejected.

Similarly, Tarrant's reliance on *Sporhase v. Nebraska*, 458 U.S. 941 (1982), is misplaced. *Sporhase* addressed groundwater in Nebraska that was not subject to the terms of an interstate compact approved by Congress. Because the surface water at issue in this case is explicitly governed by the Red River Compact, this question is controlled by federal law and Oklahoma's statutes cannot be challenged under the dormant Commerce Clause of the United States Constitution.

In short, the Tenth Circuit correctly decided this case by rejecting Tarrant's attempt to rewrite the Red River Compact. This Court should affirm the Tenth Circuit's holding and preserve the traditional sovereign powers of the State of Oklahoma to regulate and manage its water resources in a manner that will best serve the interests of its citizens.

ARGUMENT

I. THE RED RIVER COMPACT DOES NOT AUTHORIZE TEXAS OR ITS POLITICAL SUBDIVISIONS TO APPROPRIATE WATER IN OKLAHOMA.

The arguments asserted by Tarrant amount to nothing more than a request that this Court read into the Red River Compact something that simply is not there: a provision that would allow Texas or its

political subdivisions to reach into Oklahoma and appropriate water there; not for use in Oklahoma, but for use in Texas. Because no such right is stated in the Compact, Tarrant is reduced to arguing that the Compact is ambiguous and should be construed in Tarrant's favor by implying such a provision into the Compact.

It is inconceivable, however, that Oklahoma would have agreed to confer such a right on Texas or the other downstream Signatory States. *See, e.g.*, Resp. Br. 2-19 (describing history of negotiations among the Signatory States). Nor is there any evidence that Texas or any other Signatory State bargained for such a right while negotiating the Compact. *Id.* Moreover, Tarrant's own arguments, and the precedents of this Court cited by Tarrant, confirm that no such right should be implied in the Red River Compact. Instead, the Compact should be construed for what it is – a mechanism by which upstream States, including Oklahoma, Texas and Arkansas, promised to limit the amount of water they diverted from Reach II, Subbasin 5 under specified hydrologic conditions in order to ensure downstream passage of the remaining quantities of water in that Subbasin. Because there is no basis – in either the Compact or this Court's precedents – for Tarrant's position, its arguments should be rejected.

A. The Red River Compact Limits the Amount of Water Each State May Use in Reach II, Subbasin 5 – It does not Create a Right for any Signatory State to Appropriate Water in Another State.

As Tarrant acknowledges, "a compact, like a statute, must be interpreted in accordance with its plain terms. And here, the Compact's language is unambiguous." Pet. Br. 23. Yet, after acknowledging this point, Tarrant spends the balance of its brief arguing for a right that is not stated in the Red River Compact. Because the express terms of the Compact do not establish the right that Tarrant desires, Tarrant resorts to arguments based on its own interpretation of the Compact. The provisions Tarrant relies on, however, merely limit the amount of water each upstream State may divert in Reach II, Subbasin 5 under specific flow conditions. These provisions are designed to ensure that the rest of the water in Reach II, Subbasin 5 flows downstream. They do not allow a downstream State to reach into an upstream State and appropriate water for use in the downstream State.

Tarrant places principal reliance on Section 5.05 of the Compact. In particular, Subsection 5.05(b)(1) states that "[t]he Signatory States shall have *equal rights to use* runoff originating in subbasin 5 and undesignated water flowing into subbasin 5" when flows exceed 3,000 cubic feet per second ("cfs") at the Arkansas-Louisiana border. Red River Compact

§ 5.05(b)(1) (emphasis added).[2] This Subsection expressly creates a right to "use" water flowing in Subbasin 5, but it does not establish a right for one Signatory State to appropriate water within another Signatory State, and no such right can reasonably be implied from this language.

Tarrant also relies on Subsection 2.05(d) of the Compact, which provides that each Signatory State "shall have the right to . . . [u]se the bed and banks of the Red River and its tributaries to *convey* stored water, imported or exported water, and water apportioned according to this Compact." Red River Compact § 2.05(d) (emphasis added). This language, however, establishes nothing more than a right to "convey" water in the river channel. This is a right common in many Western states. *See* 1 *Waters and Water Rights* § 13.03 at 13-12 (Amy L. Kelley, ed., 3rd ed.).[3] Subsection 2.05(d) of the Compact does not state, or even suggest, that Tarrant is entitled to

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[2] Additional restrictions on water uses by upstream States are imposed by Subsections 5.05(b)(2), 5.05(b)(3), and 5.05(c) when flows in the Red River drop below 3,000 cfs, 1,000 cfs, and 526 cfs, respectively. Red River Compact §§ 5.05(b)(2), 5.05(b)(3) and 5.05(c).

[3] In fact, both Oklahoma and Texas have statutes that specifically authorize water users to use the beds of watercourses to convey appropriated water. *See* Okla. Stat. tit. 82, § 105.4; Tex. Water Code Ann. § 11.042. The Texas statute allows an appropriator to use any "flowing natural stream" to "convey the water from the place of storage to the place of use" under specified circumstances. *Id.* § 11.042(a).

appropriate water inside the State of Oklahoma and move it to Texas.

Under the language of Section 5.05(b)(1) relied on by Tarrant, each of the Signatory States secured the same rights:

> (i) the right to use up to 25% of the flows in Reach II, Subbasin 5 in excess of 3,000 cfs; and
>
> (ii) the corresponding right to be sure that excessive use (*i.e.*, greater than 25% of those flows) by an upstream State will not interfere with the downstream passage of the remainder.

These rights, however, are expressly limited by Subsection 5.05(d), which provides that "[n]o state guarantees to maintain a minimum low flow to a downstream state." Red River Compact § 5.05(d). This provision emphasizes the limited nature of the rights granted to Signatory States by Section 5.05 of the Compact. Upstream States may not exceed the limits placed on their respective uses of waters that "originate in" or are "flowing into" Reach II, Subbasin 5. But Section 5.05 does not guarantee that any particular quantity of such water will actually arrive in any downstream State. Nor does Section 5.05 allow one State to reach into another State to take the water. Put simply, if the water reaches a downstream State, that State may use the water up to the limits specified in Section 5.05, but until and unless the water arrives, the downstream State must rely on

waters allocated to it in other Reaches and Subbasins of the Red River Basin.

Importantly, Tarrant does not assert that Oklahoma is using more than its allocated share of the waters in Reach II, Subbasin 5. Because Oklahoma is not using more than its share, and is instead letting the water pass unimpeded downstream, Oklahoma is in full compliance with its obligations under Article V of the Compact.

Moreover, this interpretation of the Compact makes practical sense in light of the geography of the Red River Basin and, in particular, Reach II, Subbasin 5. This Subbasin is defined in the Compact as the mainstem of the Red River between Denison Dam and the point where the River crosses the Arkansas-Louisiana border, including all tributaries of the River in this stretch *below* the "existing, authorized or proposed *last* downstream damsites" on each tributary. Red River Compact §§ 5.01(a), 5.02(a), 5.03(a), and 5.04(a) (emphasis added). At and above these damsites, each Signatory State retains the exclusive right to use all the water it can capture. Below these damsites, each State is required to limit its uses and allow any water in excess of those authorized uses to flow downstream to the other Signatory States. However, the upstream States are not required to do more than that, and downstream States have no basis for complaining if they cannot practicably make use of some or all of the water allocated to them.

This is especially true on the mainstem of the Red River along the border between Texas and Oklahoma, where, according to Tarrant, water quality in the Red River is adversely affected by natural salt deposits. The drafters of the Compact were aware of these conditions, and the Compact expressly acknowledges the existence of "natural pollution sources," "naturally occurring salinity sources," and "natural deterioration of the water of the Red River Basin." Red River Compact §§ 11.01-11.03. Having been aware of these limitations when it approved the Compact, Texas (through its political subdivision Tarrant) cannot now assert that such natural conditions give Tarrant a basis for reaching into Oklahoma to appropriate water for use in Texas when no such right is stated in the Compact.

Texas, in fact, had substantial experience with water quality problems caused by naturally occurring salinity long before it entered into the Red River Compact. *See Texas v. New Mexico*, 462 U.S. 554, 557, n.2 (1983) (noting the "many natural difficulties" that complicated administration of the 1947 Pecos River Compact, including "a steady stream of underground brine [that] enters the [Pecos] River at Malaga Bend, some ten miles above the Texas border, severely impairing the quality of water that reaches Texas when the river is low."). Being aware of such problems, Texas could have attempted to negotiate provisions in the Red River Compact allowing it to appropriate water in Oklahoma if it believed water quality would limit its ability to use its allocated

share of water in Reach II, Subbasin 5. Texas, however, failed to do so and no such provisions appear in the Compact.

Precisely because the Compact does not guarantee either minimum flows or minimum water quality, the "excess" water in Reach II, Subbasin 5 is inherently unreliable. By its very nature, "runoff originating in subbasin 5" is as variable as the weather that causes it – droughts in some years and floods in others. Moreover, there is no guarantee that *any* amount of "undesignated water" will be "flowing into subbasin 5" because each state has the right to capture *all* of the water in the tributaries in Reach II above the "existing, authorized or proposed last downstream damsites." Red River Compact §§ 5.01(a), 5.02(a), 5.03(a), and 5.04(a). Because this water supply is so unreliable, Tarrant cannot possibly have a right to appropriate a specific annual quantity in Oklahoma (or anywhere else in Reach II, Subbasin 5). It simply has the right to "use" any such water within the State of Texas to the extent it is able to do so.[4]

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[4] Rather than seek to appropriate such an unreliable supply, Tarrant would be better off investing in water conservation, which reportedly could save more than 500 billion gallons of water per year by 2020, or enough water for nine million Texans. Mark Reagan, *Report: 500B Gallons of Water Could be Saved in Texas*, The Valley Morningstar, March 19, 2013, *available at* http://www.valleymorningstar.com/news/local_news/article_61236fbe-910a-11e2-a868-001a4bcf6878.html. This is more than four times the annual quantity Tarrant seeks to appropriate in Oklahoma.

B. Terms not Expressly Stated may not be Implied in the Red River Compact.

This Court's previous decisions, some cited by Tarrant, confirm that no right of appropriation in Oklahoma should be implied in favor of Tarrant. As Tarrant itself concedes, "[i]t is fundamental that the courts may not, in the guise of interpretation, 'read absent terms into' or otherwise 'rewrite' an 'agreement among sovereign States.'" Pet. Br. 30-31, *quoting Alabama v. North Carolina*, 130 S. Ct. 2295, 2312-2313 (2010). The Court has been very clear on this point:

> We do not – we cannot – add provisions to a federal statute. *See, e.g., Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 254, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992). And in that regard a statute which is a valid interstate compact is no different. *Texas v. New Mexico,* 462 U.S., at 564, 565, 103 S. Ct. 2558, 77 L. Ed. 2d 1. We are especially reluctant to read absent terms into an interstate compact given the federalism and separation-of-powers concerns that would arise were we to rewrite an agreement among sovereign States, to which the political branches consented. As we have said before, we will not "'order relief inconsistent with [the] express terms'" of a compact, "no matter what the equities of the circumstances might otherwise invite." *New Jersey v. New York,* 523 U.S., at 811, 118 S. Ct. 1726, 140 L. Ed. 2d 993 (quoting *Texas v. New Mexico,*

supra, at 564, 103 S. Ct. 2558, 77 L. Ed. 2d 1).

Alabama, 130 S. Ct. at 2312-13.

Furthermore, as the *Alabama* opinion notes, the Court has applied this principle to interstate compacts involving allocations of water among compacting states. *See*, *e.g.*, *Texas*, 462 U.S. at 564 (refusing to change the express terms of the two-state Pecos River Compact to authorize a tie-breaking vote for the United States' compact commissioner because "no court may order relief inconsistent with [an interstate compact's] express terms" even if the express terms prove impractical in a given instance).

Here, however, after acknowledging this well-established principle, Tarrant engages in a lengthy discussion in which it asks the Court to read into the Red River Compact a right that cannot be found in the Compact's express terms – *i.e.*, a right to appropriate water in Oklahoma. Pet. Br. 27-47. Tarrant goes so far as to assert that Oklahoma has an "obligation under the Compact to allow Tarrant to enter Oklahoma to access Texas's share." *Id.* at 39-40. Yet, the Compact contains no such wording, nor any variant of those words that would impose such an obligation on Oklahoma.

The mere fact that Tarrant needed more than twenty pages of its brief to explain why such a right should be implied in the Compact demonstrates the fallacy of the position asserted by Tarrant. To borrow Tarrant's articulation of the issue, "[i]f the drafters

'had intended'" (*id.* at 27) to grant Texas a right to appropriate water in Oklahoma, "they would have 'sa[id] so in simple language' . . . and with 'far more clarity'. . . ." *Id.* (citations omitted). Because the Red River Compact contains no simple or clear statement of the right Tarrant seeks, Tarrant's efforts to imply one should be rejected.

C. The Red River Compact Expressly Preserves the Right of Signatory States to Enact and Administer Their own Water Laws.

The Red River Compact includes two important provisions that Tarrant seeks to downplay. Specifically, Section 2.01 provides that "[e]ach state may freely administer water rights and uses in accordance with the laws of that state, but such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact." Red River Compact § 2.01. Similarly, Section 2.10 provides that "[n]othing in this Compact shall be deemed to: (a) Interfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use and control of water, or quality of water, not inconsistent with its obligations under this Compact." *Id.*, § 2.10(a).

By dismissively labeling this language as "boilerplate," Pet. Br. 38, Tarrant attempts to read out of the Compact one of the core principles of State sovereignty in this Nation – a principle of critical

importance in the arid West. As this Court has noted, throughout the long history of the relationship between the federal and state governments regarding water, there runs a "consistent thread of purposeful and continued deference to state water law by Congress." *California v. United States*, 438 U.S. 645, 653 (1978); *see also Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (recognizing "the States' traditional and primary power over land and water use."). It would be a strange anomaly indeed if Congress, in approving the Red River Compact, made an unstated exception to this consistent deference by implicitly nullifying the State of Oklahoma's water laws. To the contrary, the only rational interpretation of these two provisions is that they are intended to *preserve* Oklahoma's right to enforce its water laws as it deems best.

Viewed in this more appropriate context, Section 2.01 of the Red River Compact allows Oklahoma (or any other Signatory State) to "freely administer water rights and uses in accordance with the laws of that state," so long as Oklahoma does not take more than its allocation of water from Reach II, Subbasin 5. As noted above, *supra*, at 11, Tarrant has not alleged that Oklahoma is taking more than its share of water in this Subbasin. Furthermore, despite Tarrant's assertion to the contrary, the second half of Section 2.01 is not a limit on Oklahoma's power to administer water rights and uses in the State. Instead, it is actually a limit on the right to "**use**" water – *i.e.*, "***such uses*** *shall be subject to the availability of*

water in accordance with the apportionments made by this Compact." Red River Compact § 2.01 (emphasis added). This can only mean that a Signatory State is allowed to use water within its borders, to the extent permitted by the Compact, *when and if* the water is actually available there. It does not limit in any way Oklahoma's right to *administer* water rights within its own State. Accordingly, Subsection 2.01 allows Oklahoma to enforce the statutes Tarrant challenges here.

Likewise, Section 2.10 is intended to preserve, not limit, Oklahoma's right to "regulate within its boundaries the appropriation, use and control of water" so long as that right is not exercised in a manner that is inconsistent with Oklahoma's obligations under the Compact. As explained in Section I.A., *supra* at 8-13, the Red River Compact requires Oklahoma to limit its use of water from Reach II, Subbasin 5 and to not interfere with the downstream movement of the balance of that water. It does not obligate Oklahoma to allow Tarrant, or any other political subdivision of a Signatory State, to enter Oklahoma to appropriate water for an out-of-state use. No such right is stated in the Compact and, as discussed in Section I.B., *supra* at 14-16, none should be impliedly added to the Compact for Tarrant's benefit. As a result, Section 2.10 of the Compact fully supports Oklahoma's enforcement of its laws concerning "appropriation, use and control of water" within its borders.

D. Oklahoma's Position Regarding the Red River Compact is Consistent with Other Interstate Water Allocation Compacts.

There are approximately 23 interstate water compacts in the United States. *See* 3 *Waters and Water Rights*, *supra*, § 46.01. Although the compacts vary significantly in their details, they all have at least this much in common:

> To apportion water between the [compacting] states, a compact must either: (1) limit how much water the upper state can use or (2) guarantee the lower state a certain amount of water. The apportionment formulas used in the various compacts vary widely, but all are instances of one or both of these alternatives.

Id., § 46.03.

For Reach II, Subbasin 5, when flows exceed 3,000 cfs, the Red River Compact is an example of the first type of compact described above. Specifically, limits are imposed on diversions by upstream States to ensure that any available water above such limits will flow to the downstream States. As discussed above, *supra* at 10-11, the Red River Compact *does not* require upstream States to guarantee "to maintain a minimum low flow to a downstream state." Red River Compact § 5.05(d). Other compacts in this category are typically enforced when the downstream State asserts that the upstream State has exceeded the limits on its water consumption. *See, e.g.*, *Montana v. Wyoming*, 131 S. Ct. 1765 (2011) (suit by

Montana asserting that Wyoming was using more than its allocated water uses under the Yellowstone River Compact); *Kansas v. Colorado*, 533 U.S. 1 (2001) (suit by Kansas asserting that Colorado had exceeded its allocated water uses under the Arkansas River Compact); *Texas v. New Mexico*, 482 U.S. 124 (1987) (suit by Texas asserting that New Mexico exceeded its allocated water uses under the Pecos River Compact). As noted above, *supra* at 11, Tarrant has made no such allegation against Oklahoma in this case. Instead, Tarrant seeks an implied right to reach into Oklahoma, appropriate water there, and transport that water to a place of use in Texas *regardless* of Oklahoma's compliance with its obligations under the Compact. This right is not found in the text of the Compact, and the Compact cannot be expanded to include it at Tarrant's request. *See Texas*, 462 U.S. at 564.

There are numerous examples where this Court has enforced compacts by either requiring upstream States to reduce water diversions or by requiring payment of damages for excessive diversions. *See, e.g.*, *Kansas*, 533 U.S. 1 (awarding money damages and pre-judgment interest to compensate for damages suffered by overuse of water in Colorado); *Texas v. New Mexico*, 482 U.S. 124 (imposing injunction requiring New Mexico to deliver water due to Texas under Pecos River Compact, including water that should have been delivered in prior years). These are the standard means by which downstream States enforce their rights under interstate compacts. 3 *Waters and*

Water Rights, *supra*, § 46.05. Tarrant, however, has not identified a single example of an interstate compact where this Court has found an implied right to enter another compacting State and appropriate water there for use in the first State.[5] The absence of such precedents is telling. To uphold Tarrant's arguments in this case would break new and troubling ground, and it would impair Oklahoma's right to regulate and administer the water resources on which its citizens depend.

II. THE DORMANT COMMERCE CLAUSE HAS NO BEARING ON INTERPRETATION OF THE RED RIVER COMPACT.

After exhausting its arguments for an implied right to appropriate water in Oklahoma, Tarrant raises the alternative argument that Oklahoma's statutes violate the "dormant Commerce Clause" jurisprudence of this Court. Specifically, Tarrant argues that under *Sporhase v. Nebraska*, *supra*, any limitation on Tarrant's asserted right to appropriate water in Oklahoma must be struck down. *See* Pet. Br. 47-55. This argument, however, is equally unpersuasive.

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[5] This point is reinforced by Respondents' citation to several examples of compacts that *expressly* allow appropriation by one compacting State within the borders of another compacting State. *See* Res. Br. 30, n.10. No compact has ever been held to imply such a right because compacting States know how to expressly provide one when they choose to do so.

For whatever continued applicability it may have in the context of dormant Commerce Clause jurisprudence generally,[6] *Sporhase* simply has no bearing on this case. First, *Sporhase* involved groundwater that landowners in Nebraska are entitled to access by virtue of land ownership. In contrast, Oklahoma's unappropriated surface water is a public resource, and rights to use surface water may only be acquired by strict adherence to Oklahoma's statutory processes. Okla. Stat. tit. 82, §§ 105.9, 105.10, 105.14; *see also, e.g.*, *Wagoner Cty. Rural Water Dist. No. 2 v. Grand River Dam Authority*, 241 P.3d 1132 (Okla. Civ. App. 2010), *cert. den.*, 131 S. Ct. 1045 (Sept. 20, 2010). As *Wagoner County* noted,

> Oklahoma's 'power to control unappropriated public waters is plenary. Definite nonnavigable streams are public waters. The state may either reserve to itself or grant to others its right to utilize these streams for beneficial purposes.' *Oklahoma Water Res. Bd. v. Cent. Okla. Master Conservancy Dist.*, 1968 OK 73, ¶ 14, 464 P.2d 748, 753. Further, '[t]he Legislature may exercise its police power to protect the state's water irrespective of the rights of private owners of the land most immediately concerned.' *Jacobs*

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[6] *See, e.g.*, Christine A. Klein, *The Dormant Commerce Clause and Water Export: Toward a New Analytical Paradigm*, 35 Harv. Envtl. L. Rev. 131 (2011) (suggesting that this Court's more recent dormant Commerce Clause cases call into question whether *Sporhase* would be decided differently today).

Ranch, L.L.C. v. Smith, 2006 OK 34, ¶ 23, 148 P.3d 842, 849-50.

Id. at 1135. Because unappropriated surface waters in Oklahoma are subject to the plenary police power of the Oklahoma legislature and a party seeking a right to use such water must secure permission from the Oklahoma Water Resources Board, Okla. Stat. tit. 82, § 105.9, Oklahoma's unappropriated public waters are not articles of commerce that should be subjected to dormant Commerce Clause scrutiny.

Furthermore, as the Tenth Circuit noted, the dormant Commerce Clause cannot be used to attack an act of Congress, and by consenting to the Red River Compact, Congress "transform[ed] the States' agreement into federal law under the Compact Clause." *Tarrant,* 656 F.3d at 1236 (*quoting Cuyler v. Adams,* 449 U.S. 433, 440 (1981)). Furthermore, "[a]s federal law, interstate compacts themselves cannot be challenged under the dormant Commerce Clause." *Id.* (*citing Intake Water Co. v. Yellowstone River Compact Comm'n*, 769 F.2d 568, 569-70 (9th Cir. 1985)).

As discussed in Section I.C. of this brief, *supra* at 16-19, the Red River Compact contains two express provisions authorizing Oklahoma (as well as the other compact States) to enforce and administer its water laws in the manner it deems appropriate. *See* Red River Compact, §§ 2.01, 2.10(a). When Congress approved the Compact, it transformed these provisions into federal law and expressly allowed Oklahoma to enforce its water laws. As the Tenth Circuit

held, the "broad language of [these and other] key Compact provisions inoculates the Oklahoma statutes from dormant Commerce Clause attack." *Tarrant*, 656 F.3d at 1237. The Tenth Circuit did not limit this holding to statutes that were in effect at the time Congress approved the Compact, but it specifically noted that some of the statutes being challenged by Tarrant did, in fact, exist at that time. *Id.* at 1238. As to these statutes, the court correctly concluded that, "when Congress ratified the Compact and granted to each state the power to 'freely administer' the water, it gave congressional consent to the pre-Moratorium statutes at issue here. . . ." *Id.* Finally, the court noted that these kinds of express provisions authorizing Oklahoma's water laws "were completely lacking in the *Sporhase* case." *Id.*, at 1239.

The Tenth Circuit's analysis is correct. The Red River Compact is federal law. *Cuyler*, 449 U.S. at 433; *Texas*, 462 U.S. at 564. The Compact contains two provisions that expressly authorize Oklahoma to enforce its water laws. Red River Compact §§ 2.01, 2.10(a). Oklahoma's statutes are consistent with the express terms of the Compact. *See* Section I.A., *supra* at 8-13. As a result, the Oklahoma statutes are "inoculated from dormant Commerce Clause attack," *Tarrant*, 656 F.3d at 1238-39, and *Sporhase* has no bearing on this case. Accordingly, Tarrant's dormant Commerce Clause argument should be rejected.

CONCLUSION

For all of the foregoing reasons, the Court should affirm the judgment of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
Petitioner,

v.

RUDOLF JOHN HERRMANN, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR OKLAHOMANS FOR RESPONSIBLE WATER POLICY AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

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INTEREST OF THE *AMICUS*[1]

Oklahomans for Responsible Water Policy (herein "ORWP") is a grassroots citizens' organization with over 14,000 members. In 2010, ORWP was incorporated as a not-for-profit for the purpose of responding to various threats on Southeast Oklahoma's[2] water resources. Specifically, thirsty metropolitan entities, such as Petitioner, seek to export vast quantities of water from Southeast Oklahoma to areas of unchecked urban sprawl in North Texas.

Petitioner treats Oklahoma's water resources as a commodity—a commodity it believes it can forcibly take from Oklahoma. However, water is much more than a simple commodity interest; it is a *community* interest—a unique resource that benefits far more than the "legal" owner. Water serves as a catalyst

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[1] All parties consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. SUP. CT. R. 37.2(a). Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief, in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae* or its members made a monetary contribution to the brief's preparation or submission. SUP. CT. R. 37.6.

[2] For purposes of this brief, Southeast Oklahoma is comprised of the following counties: Atoka, Bryan, Choctaw, Coal, Haskell, Hughes, Johnston, Latimer, Le Flore, McCurtain, Pittsburg, Pontotoc, and Pushmataha.

for growth and development in Southeast Oklahoma by providing long-term employment opportunities for Southeast Oklahoma citizens and supplying much needed revenues to local entities, communities, and counties. While the level of economic development between Southeast Oklahoma and North Texas differ dramatically, it does not alter Southeast Oklahoma's right to utilize a natural resource within its State—nor does the difference in economic development give North Texas priority over Southeast Oklahoma for use of water located within Oklahoma. ORWP and its members will be directly and negatively affected should the vast quantities of water Petitioner seeks be removed from the basin. As such, ORWP believes its unique perspective will aid the Court in its final decision.

SUMMARY OF ARGUMENT

1. Petitioner argues the Red River Compact, Pub. L. No. 96-564, 94 Stat. 3305 (1980), authorizes it to invade Oklahoma's sovereign territory in order to obtain the portion of water allocated to the State of Texas in Reach II, Subbasin 5. However, a foundational premise of the Red River Compact (herein "Compact") is that each Signatory State retains the right or power "to regulate within its boundaries the appropriation, use, and control of water, or quality of water." Compact § 2.10(a). Petitioner's argument runs afoul of each State's right as a quasi-sovereign to govern "all the earth and air within its domain." *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). Oklahoma, like all other states, possesses the authority to protect the health and safety of its citizens. Nothing in the

Compact abrogates such right; to the contrary, both the language and intent of the Compact protects Oklahoma's ability to regulate the water resources within its borders in the manner it sees fit.

2. Petitioner also challenges the constitutionality of certain Oklahoma statutes[3] (herein "Oklahoma's Water Statutes) as violating the Dormant Commerce Clause. *See* Pet. B. at § D. However, even if the Compact did allow for one State to remove its entire share of Reach II, Subbasin 5 water from within the boundaries of another State—which it does not—each State retains the authority under its police powers to place limitations upon the time, manner, and location of interstate water transfers in order to protect the public welfare of its citizens. Oklahoma's Water Statutes strike the appropriate balance between protecting legitimate public interests and using narrowly tailored means to do so.

First, Oklahoma's Water Statutes protect an undeniably legitimate interest. Implementing regulations, such as Oklahoma's Water Statutes, is at the core of Oklahoma's police power. As such, protecting Oklahoma citizens' health and safety is a legitimate public welfare interest in which Oklahoma's exercise of its police power is proper.

Second, Oklahoma's Water Statutes are narrowly tailored to achieve the articulated legitimate interests. Rather than being absolute prohibitions

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[3] The challenged statutes include Okla. Stat. tit. 82, §§ 105.9, 105.12, 105.12A, 105.16(B), 1085.2(2), 1085.22, and 1086.1(A)(3).

on interstate-interbasin water transfers, Oklahoma's Water Statutes expressly contemplate out-of-state water use. However, in light of the overwhelming public health and safety concerns related to the permanent removal of water from Oklahoma, its Water Statutes place reasonable and narrowly tailored restrictions upon any interstate-interbasin transfer, similar to the restrictions Oklahoma places upon any intrastate-interbasin transfer.

3. Petitioner's attempted water grab highlights a plethora of social considerations and equitable principles. Water transfers affect far more than just the "buyer" and "seller." Citizens and communities in Southeast Oklahoma depend upon water to support the growing tourism and recreation industries. Such industries provide much needed employment for those living in the historically impoverished region. Petitioner and its *amici* seek Oklahoma's water to further develop a water-dependent metroplex in a water-scarce region; ORWP and its members seek to protect the same water to continue putting food on the table.

For all of these reasons, this Court should affirm the decision of the Tenth Circuit.

ARGUMENT

I. THE COMPACT DOES NOT RESTRICT OKLAHOMA'S SOVEREIGN POWER WITHIN ITS BOUNDARIES.

The primary issue before the Court is the interpretation the Red River Compact (herein the "Compact") and, more specifically, of Section 5.05 of the Compact. Section 5.05 grants each Signatory State "equal rights *to the use of* runoff originating in subbasin 5 and undesignated water flowing into subbasin 5." Compact § 5.05(b)(1) (emphasis added). Here, Petitioner asserts that this section grants it unregulated authority to divert water included in Texas's apportionment of Subbasin 5 from within the territorial boundary of Oklahoma.

As a contract between the Signatory States, the Compact "must be construed and applied in accordance with its terms." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (relying on *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951)). A bedrock principal of contract interpretation is that "[a] written contract *must be read as a whole* and every part interpreted with reference to the whole," with preference "given to *reasonable* interpretations." *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1205, 1032 (9th Cir. 1990) (emphasis added) (internal citation omitted) (quoting *Shakey's Inc. v. Covalt*, 704 F.2d 426, 434 (9th Cir. 1983)). This is congruent to this Court's rules of statutory construction requiring courts to look to "the language and design of the statute as a whole" when

ascertaining the plain meaning of a statute. *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

The purpose of the Compact is "[t]o provide an equitable apportionment among the Signatory States of the water of the Red River and its tributaries" in an effort to "remove causes of controversy between each of the affected states." Compact §§ 1.01(a)-(b). The Compact affirms each Signatory State's right to "use the water allocated to it by [the] Compact in any manner deemed beneficial by that state." Compact § 2.01. The Compact further affirms that each Signatory State retains that right or power "to regulate *within its boundaries* the appropriation, use, and control of water, or quality of water." Compact § 2.10(a) (emphasis added).

This is consistent with each Signatory State's right as a quasi-sovereign respecting "all the earth and air within its domain." *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907); *see also Arkansas v. Oklahoma*, 503 U.S. 91, 98 (1992) (when deciding controversies between States regarding the pollution of shared waterways "this Court has applied principles of common law tempered by a respect for the sovereignty of the States."). A state has "the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." *Tennessee Copper Co.*, 206 U.S. at 237. Petitioner's interpretation of the Compact would strip Oklahoma of any such power, despite the Compact expressly reserving Oklahoma's rights as sovereign. Under Petitioner's implausible interpretation, non-state entities would have the right to invade Oklahoma, demolish its lands, take

its water resources, and strip from Oklahoma's citizens the right to access and use such water—all without Oklahoma's consent.[4] It cannot be inferred from the language of Section 5.05 that the Compact intended to destroy Oklahoma's sovereign rights.[5]

Section 5.05, by its unambiguous terms, provides only that "[t]he Signatory States shall have equal rights *to the use of*" water in Subbasin 5. Compact § 5.05(b)(1) (emphasis added). The section does not grant the Signatory States unabridged access to the water at any location of its choosing. Instead, Section 5.05 expressly recognizes the Signatory States' rights and obligations to control water uses *within its own jurisdiction*. *See* Compact §§ 5.05(b)(2)-(3) and 5.05(c).

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[4] This also raises questions in regard to whether foreign entities would have the authority to claim "eminent domain" over Oklahoma citizens, such as ORWP's membership, who may own land in the path of any transport line the foreign entity seeks to construct. Such a situation would have profound consequences upon ORWP and its members: if Petitioner's interpretation is accepted, then thousands of Oklahomans would be subject to governmental control by governments in which they have no right to participate politically.

[5] Nor can Petitioner infer water quality considerations into this section of the Compact. Specifically, Petitioner argues it must be allowed to invade Oklahoma's sovereign territory because the salinity of the Red River renders it unusable. *See* Pet. B. at 6. However, the Compact's allocation of water in Reach II, Subbasin 5 makes no mention of water quality considerations; rather, this provision of the Compact sought to harmonize the signatory states' divergent water law schemes and account for Louisiana's inability to construct reservoirs for water storage when equally allocating the water. 1JA27. As such, Petitioner's argument is misplaced and irrelevant.

The comments to the Compact affirm such an interpretation. The Compact's drafters noted the divergent water laws of the four Signatory States complicated the allocation of Reach II, as did the fact that Louisiana had no reservoir sites of significant size in which to store water. Although the "[u]stream states never questioned that Louisiana needed and is entitled to water; the problem was to make provision for this flow without releases from upstream storage." IJA25. To resolve these many issues, Reach II was divided into five subbasins. Within the first four upstream subbasins, "flows were divided between the concerned states." IJA25. In the last subbasin, Subbasin 5, "the upstream states agree to cooperate in assuring a reliable flow to Louisiana." IJA25. As the comments evidence, there is no nefarious meaning behind the absence of state boundary delineations; rather, Reach II, Subbasin 5 addressed the complicated factual realities associated with ensuring Louisiana maintained a reliable flow.

Moreover, nothing in Section 5.05 abrogates the overarching premise that Signatory States control water uses within their own jurisdiction. The Comments make clear that the Compact "is not intended to interfere with any state's internal administration of water and/or water rights. . . Sections 2.01, 2.05, 2.10 and 2.14 each, at least in part, are intended to insure that the state's internal autonomy is not displaced by the Compact." 1JA12.

Nothing in the Compact's plain language or underlying intent allows one State to invade the sovereign territory of another State for the removal of water.

II. EVEN IF THE DORMANT COMMERCE CLAUSE IS APPLICABLE, WHICH IT IS NOT, OKLAHOMA'S WATER STATUTES ARE NARROWLY TAILORED TO PROTECT LEGITIMATE PUBLIC WELFARE INTERESTS.

ORWP concurs with the compelling legal argument made by Respondents that the Dormant Commerce Clause is inapplicable to the water allocated by Reach II, Subbasin 5 of the Compact. However, even if the Dormant Commerce Clause was applicable to this situation—*which it is not*—Oklahoma, as a quasi-sovereign, must have reasonable control over the time, manner, and location of water removed from its territory in order to protect the health, safety, and welfare of its citizens. Oklahoma's Water Statutes afford such reasonable control through legislation that is narrowly tailored to protect legitimate health, safety, and welfare interests.

Oklahoma's Water Statutes set forth different requirements for interstate-interbasin users, for intrastate-interbasin users, and for intrastate-intrabasin users. Because the Statutes treat interstate users differently than intrastate users (whether intrabasin or interbasin) the Statutes are considered invalid unless narrowly tailored to the asserted legitimate local interest. *See Sporhase v.*

Nebraska ex rel. Douglas, 458 U.S. 941, 955 (1982) ("Although Commerce Clause concerns are implicated by the fact that [Nebraska's groundwater statute] applies to interstate transfers but not to intrastate transfers, ***there are legitimate reasons for the special treatment accorded requests to transport groundwater across state lines.***") (emphasis added).

A number of factors inform the determination of whether a restriction on commerce imposed by a State's water regulations is reasonable or unreasonable, including traditional federal deference to state regulation of its water resources, a state's authority pursuant to its police power to protect the public health and safety, a state's interest in conserving and preserving finite water resources, and environmental protections. *Id.* at 953-954.

Historically, the federal government deferred to state law regarding water allocation and administration. *See id.* at 956. United States law acknowledges the relevance of state boundaries when allocating finite water resources. *See id.* at 956. As such, States have come to have a "legal expectation" that restrictions on water within their borders are proper in certain circumstances. *See id.* at 956 ("the legal expectation that under certain circumstances each State may restrict water within its borders has been fostered over the years not only by our equitable apportionment decrees, but also by the negotiation and enforcement of interstate compacts") (internal citations omitted).

Additionally, Oklahoma holds the surface water within its state in a public trust for the benefit and welfare of its citizens. *See* Okla. Stat. tit. 60, § 60 (2013) ("such water then becomes public water and is subject to appropriation for the benefit and welfare of the people of the state"). By doing so, Oklahoma recognizes that water is something that cannot be privatized—it is something in which the entire community has an interest. While Oklahoma's treatment of surface water as a public trust "cannot justify a total denial of federal regulatory power, it may support a limited preference for its own citizens in the utilization of the resource." *Sporhase*, 458 U.S. at 956; *see also Hicklin v. Orbeck*, 437 U.S. 518, 533-534 (1978) ("Although the fact that a state-owned resource is destined for interstate commerce does not, of itself, disable the State from preferring its own citizens in the utilization of that resource, it does inform analysis under the Privileges and Immunities Clause as to the permissibility of the discrimination the State visits upon nonresidents based on its ownership of the resource.").

Moreover, Oklahoma has an interest in conserving and preserving the finite water resources within its borders. Although none of these factors, standing alone, insulate Oklahoma from the exercise of federal regulatory authority, these factors do inform the Court's analysis regarding the reasonableness of Oklahoma's Water Statutes. *See Sporhase*, 458 U.S. at 953.

A. Oklahoma's Water Statutes Protect Legitimate Public Health, Safety, and Welfare Interests.

This Court has "long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other." *Sporhase*, 458 U.S. at 956. Implementing regulations for the purpose of protecting the health of a State's citizens "is at the core of its police power." *Id.* at 956. This Court recognized that protection against drought is a legitimate public welfare interest for which a State, such as Oklahoma, can exercise its police power. *See id.* at 956 (stating that a "State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens – and not simply the health of its economy – is at the core of its police power.") Courts "are reluctant to condemn as unreasonable, measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage." *Id.* at 956. Moreover, conservation and preservation of a State's water resources is an "unquestionably legitimate and highly important" purpose. *Id.* at 954.

Oklahoma articulated the legitimate interests it seeks to protect in its Water Statutes, including protecting the public welfare[6], protecting basins of origin[7], protecting domestic uses[8], maintaining

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[6] Okla. Stat. tit. 82, §§ 105.12(A) and 105.12A(A) (2013).

[7] Okla. Stat. tit. 82, §§ 105.12(A)(4) and 105.12(B) (2013).

[8] Okla. Stat. tit. 82, § 105.12(A)(3) (2013).

adequate supplies for present and future demands of the state[9], and facilitating the conservation and preservation of its public waters[10].

Oklahoma's ability to protect the health and safety of the public becomes particularly critical during times of drought. Currently, drought paralyzes the State—the U.S. Drought Monitor classified all seventy-seven counties in Oklahoma as experiencing drought conditions, with over half the state experiencing extreme drought conditions.[11] Approximately ten percent (10%) of Oklahoma suffers from Exceptional Drought, which is the U.S. Drought Monitor's highest drought intensity category.[12] Earlier this year, federal officials declared the drought-stricken State of Oklahoma a disaster area and made low-interest emergency loans available to farmers in all seventy-seven Oklahoma counties.[13] Forecasts indicate the drought currently gripping Oklahoma will not loosen its hold in the near future.[14] Because of such grim drought predictions, it is imperative that Oklahoma be able

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[9] Okla. Stat. tit. 82, § 105.12A(A) (2013).

[10] Okla. Stat. tit. 82, § 105.12A(A) (2013).

[11] *See* Univ. Neb.-Lincoln, United States Dept. of Agriculture, Nat'l Oceanic and Atmospheric Administration, *Oklahoma Drought Monitor*, (Mar. 21, 2013) (available at http://droughtmonitor.unl.edu/ DM_state.htm?OK,S.).

[12] *See id.*

[13] Michael Overall, *Extreme Drought Prompts Statewide Disaster Declaration In Oklahoma*, Tulsa World (Jan. 10, 2013).

[14] William Crum, *Long-Range Forecasts Predict Dry, Hot Summer For Oklahoma*, The Daily Oklahoman (Mar. 12, 2013).

to protect the health, safety, and welfare of its citizens, particularly when dealing with the present and unrelenting drought conditions.

Oklahoma also has legitimate interests in protecting nonconsumptive uses, such as instream flows[15], environmental flows, and recreational uses. In the recently published Oklahoma Comprehensive Water Plan (OCWP), "technical analyses discovered that due to forecasted increases in demands on surface water the magnitude and probability of gaps (shortages) will increase in many basins across the state, greatly increasing the likelihood of periods of low to zero flow." Oklahoma Water Resources Board, *2012 Oklahoma Comprehensive Water Plan Executive Report*, 12 (Feb. 2012). This is particularly concerning because instream and environmental uses were not accounted for in the OCWP's water availability calculations. *See* Oklahoma Water Resources Board, *Oklahoma Comprehensive Water Plan Southeast Watershed Region Report*, 21 (Feb. 2013) ("OCWP demands were not projected for non-consumptive or instream water uses, such as hydroelectric power generation, fish and wildlife, recreation and instream flow maintenance"). As a result, the amount of water reported as surplus water or water available for appropriation is dramatically overstated. To remedy this, Oklahoma is exploring different approaches, such as the

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[15] The definition of "instream flow" varies dramatically; however, for purposes of this brief, instream flow refers to the quantity and timing of water flow required in a stream or river to sustain its freshwater ecosystem and the human livelihoods that depend upon it.

instream flow requirements mandated in Texas, to develop its own instream flow standards. It is well within Oklahoma's power as quasi-sovereign to protect nonconsumptive uses.

Accordingly, Oklahoma's Water Statutes are clearly motivated by "unquestionably legitimate and highly important" local interests, thereby satisfying the first prong of this Court's strict scrutiny analysis.

B. Oklahoma's Water Statutes are Narrowly Tailored.

Oklahoma's Water Statutes likewise satisfy the second prong of the strict scrutiny analysis because they are narrowly tailored to achieve the articulated legitimate purposes. Oklahoma's Water Statutes are not total bans on the interstate transport of water; rather, the Statutes place reasonable restrictions on the permanent interbasin transfer of a vital natural resource.[16]

For *all* permit requests, the Oklahoma Water Resources Board (herein "OWRB") must determine whether (1) there is unappropriated water available in the amount sought; (2) the applicant has a present or future need to put the water to beneficial use; and (3) the proposed use does not interfere with domestic

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[16] Indeed, the Water Statutes challenged by Petitioner expressly contemplate out-of-state transfers. *See* Okla. Stat. tit. 82, §§ 105.12(A)(5), 105.12(D), 105.12(E), 105.12(F), and 105.12A. Rather than prohibiting such transfers, Oklahoma's Water Statutes set forth reasonable requirements to allow the State to responsibly manage a precious natural resource.

or existing appropriative uses. *See* Okla. Stat. tit. 82, § 105.12(A) (2013).

Additional requirements are placed on intrastate- and interstate-interbasin transfers. Specifically, no interbasin transfer—regardless of whether such transfer is for intrastate or interstate use—can "interfere with existing or proposed beneficial uses within the stream system and the needs of the water users therein." Okla. Stat. tit. 82, § 105.12(A)(4) (2013). Moreover, any pending application for use of water within the basin of origin "shall first be considered in order to assure that applicants within the stream system shall have all of the water required to adequately supply their beneficial uses." Okla. Stat. tit. 82, § 105.12(B)(1) (2013). Normally, applications are processed in the order in which they are received[17]; however, this leap-frog provision allows intrabasin applications to be considered before interbasin applications in order to protect the consumptive and nonconsumptive needs of those within the basin. The OWRB is also statutorily required to "review the needs within the area of origin every five (5) years to determine whether the water supply is adequate for municipal, industrial, domestic, and other beneficial uses." Okla. Stat. tit. 82, § 105.12(B)(2) (2013).

When viewed in their entirety, Oklahoma's Water Statutes do not discriminate based upon State citizenship, but rather create a paradigm where the applicant must make a greater showing to the

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[17] *See* Okla. Stat. tit. 82, § 105.1A (2013) ("priority in time shall give the better right.").

OWRB, depending upon how far the applicant is located from the proposed withdrawal, whether outside the basin of origin or outside the State. Oklahoma places strict restrictions upon its own citizens seeking to transport water outside the basin of origin. In light of such legitimate restrictions, which are applied both within and without the state, Oklahoma "is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State." *Sporhase*, 458 U.S. at 955-956. To allow an exemption for interstate transfers when a state imposes strict restrictions upon its own citizens "would be inconsistent with the ideal of evenhandedness in regulation." *Id.* at 956.

III. SOCIAL CONSIDERATIONS AND EQUITABLE PRINCIPLES SUPPORT THE TENTH CIRCUIT'S HOLDING.

This Court's decision is of extreme importance to ORWP and its members. Petitioner's attempted "water grab" raises a number of policy issues and social considerations, which highlight the unique characteristics of water. Unlike normal commodities, in which a transfer affects the buyer and the seller, water transfers affect a host of "third parties," including other water rights holders, agriculture, the environment, rural interests, urban interests, ethnic communities, Indian tribes, and taxpayers.[18]

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[18] Committee on Western Water Management, Natural Research Council, *Water Transfers in the West: Efficiency, Equity, and the Environment*, 38 (National Academy Press) (1992).

Historically, Southeast Oklahoma was an impoverished region of the State with a large percentage of its citizens falling below the poverty line.[19] Recently, however, tourism and recreation opportunities supported by access to water provide many citizens in the region with steady, well-paying jobs. Those jobs place food on the table, pay mortgages and utility bills, buy school shoes and supplies for their children, and help launch the next generation of educated and productive Oklahomans.

Additionally, water related tourism and recreation provides much needed tax revenues to counties and communities. For example, lodging taxes in McCurtain County, Oklahoma, have nearly doubled since 2006, providing roughly $400,000 dollars to the County's coffers in 2012.[20] Despite the Nation's dismal economic climate, McCurtain County's exponential growth mirrors the growth of many Southeast Oklahoma counties—all made

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[19] According to the United States Census Bureau Small Area Income and Poverty Estimates, an average of twenty-two percent (22%) of persons in Atoka, Bryan, Choctaw, Coal, Haskell, Hughes, Johnston, Latimer, Le Flore, McCurtain, Pittsburg, Pontotoc, and Pushmataha Counties fell below the poverty line 2009, down from twenty-eight percent (28%) in 1989. *See* United States Census Bureau, *Small Area Income and Poverty Estimates*, Oklahoma State and County Data (Feb. 2013) (available at http://www.census.gov/did/www/saipe/data/interactive/#view=StateAndCounty).

[20] Documentation is on record with ORWP and can be provided at the Court's request.

possible by access to the very water Petitioner improperly seeks to remove.[21]

The removal of such vast quantities of water would halt any further economic development in Southeast Oklahoma.[22] Yet, Petitioner makes no effort to hide the fact that it seeks Oklahoma's water in order to further *its own* economic development. *See* Pet. B. at 13. Allowing a foreign entity to control water in Oklahoma would be, in practical effect, a judicial determination that the economic development of Texas is more important than the economic development of Oklahoma.[23] Moreover,

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[21] While the counties and citizens in Southeast Oklahoma certainly "use" the water, the uses are largely nonconsumptive. Currently, Oklahoma law does not account for nonconsumptive beneficial uses, which results in an extraordinarily low reporting of the quantity of water "used" in Oklahoma. *See* Pet. B. at 14. However, one of the OWRB's recommendations in its 2012 OCWP was to develop and implement a system for protecting and accounting for such nonconsumptive—yet immensely important—uses.

[22] ORWP vehemently objects to Petitioner's assertion that removing tremendous quantities of surface water from Oklahoma, and particularly from Southeast Oklahoma, will have "medium/low Third Party adverse impacts." 2JA35. As established above, Southeast Oklahoma's budding economy revolves wholly around water—specifically water in its natural place.

[23] ORWP supports the fundamental purpose of the Commerce Clause and understands the prohibition on restrictions motivated purely by economic protectionism. However, ORWP does ***not*** believe the purpose of the Commerce Clause was to allow one state to wield the prohibition on economic protectionism as a weapon against another state in order to sate its own economically motivated hunger.

such a determination would place one hundred percent (100%) of the burden on Oklahoma and its citizens, while Petitioner and Texas would reap one hundred percent (100%) of the benefit.[24]

Petitioner attempts to justify its water grab by pointing to "unused water" flowing out of Oklahoma and into the Red River. *See* Pet. B. at 14. However, as stated, *supra*, the amount of water classified as "surplus" or "available" water by the Oklahoma Comprehensive Water Plan is wildly overstated, since it does not account for the many nonconsumptive uses of Oklahoma's water resources. *See supra* p. 13 and note 22. Moreover, as Congress made clear when prohibiting future out of basin transfers from the Great Lakes, which comprise approximately twenty percent (20%) of the world's freshwater supply, the quantity of water in a given area is not a dispositive factor. *See* 42 U.S.C. § 1962d-20 (2013) (finding the Great Lakes provide water supply, clean energy, transportation, and recreational uses for United States and Canadian citizens and declaring that "any new diversions of Great Lakes water for use outside of the Great Lakes basin will have significant economic and environmental impacts, adversely affecting the use of this resource by the Great Lakes States and Canadian provinces").

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[24] Assuming the Compact allows one state to remove water from within the boundaries of another state—which, as explained *supra*, it does not—Petitioner should be required to obtain as much of its "equal share" from within its own borders before raiding the water resources of Oklahoma and burdening Oklahoma's citizens.

Implicit in Petitioner's quantity-based argument is a presumptuous assumption that it knows the best "use" for Oklahoma's finite natural resource. However, Oklahoma's public policy is to "conserve and utilize the waters of the state, and to protect, maintain and improve the quality thereof for public water supplies, for the propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, recreational and other legitimate beneficial uses,"[25] while it has been the policy of some North Texas municipalities to allow the unabashed waste of limited water supplies. Indeed, in 2011—the driest year in recorded Texas history—outdoor watering comprised forty-five percent (45%) of the City of Fort Worth's total water usage. *See* Texas Water Development Board, Technical Note 12-01, *The Grass Is Always Greener...Outdoor Residential Water Use In Texas*, 28 (Nov. 2012). During the same period, the City of Dallas dedicated forty-seven percent (47%)—***nearly half***—of its total water usage to outdoor watering. *See id.* Now, as a result of its own wasteful use of a finite water supply, Petitioner seeks to similarly waste Oklahoma's valuable water resources, which Oklahoma has so diligently sought to protect.

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[25] Oklahoma Water Resources Board, *Oklahoma Comprehensive Water Plan Instream Flow Issues and Recommendations*, 4-5 (Feb. 2011) (internal citations omitted).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Tenth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT, PETITIONER

v.

RUDOLF JOHN HERRMANN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR PROFESSORS OF LAW AND POLITICAL SCIENCE AS AMICI CURIAE SUPPORTING RESPONDENTS

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BRIEF FOR PROFESSORS OF LAW AND POLITICAL SCIENCE AS AMICI CURIAE SUPPORTING RESPONDENTS

INTEREST OF AMICI CURIAE

Amici are professors of law and political science who teach and regularly publish in the fields of water law, interstate relations, and federalism.[1]

Amicus Marguerite A. Chapman is a professor emeritus of law at the University of Tulsa College of Law.

[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than amici or their counsel made such a monetary contribution. The parties have entered blanket consents to the filing of amicus briefs, and copies of their letters of consent are on file with the Clerk's Office.

Among Professor Chapman's numerous scholarly publications is her article *Where East Meets West in Water Law: The Formulation of an Interstate Compact to Address the Diverse Problems of the Red River Basin*, 38 Okla. L. Rev. 1 (1985), which provides a detailed analysis of the text, drafting history, and the negotiating history of the Red River Compact. That article has been repeatedly cited by the parties, and by the United States, in their briefs in this case.

Amicus Christopher J. Dalbom is a senior research fellow in the Institute on Water Resources Law and Policy at Tulane University Law School.

Amicus Mark S. Davis is a senior research fellow and director of the Institute on Water Resources Law and Policy at Tulane University Law School. Professor Davis has published several scholarly articles on natural resources law, including articles on water use and Louisiana's public-trust doctrine. He currently serves as a member of the board for America's Wetland Foundation and of the Environmental Advisory Board for the Greater New Orleans Foundation. Before coming to Tulane, Professor Davis served as the Executive Director of the Coalition to Restore Coastal Louisiana. In addition, he received the 1998 Environmental Hero Award from the United States Department of Commerce.

Amicus Christine A. Klein is the Chesterfield Smith Professor of Law, and director of the L.L.M. Program in Environmental and Land Use Law, at the University of Florida Levin College of Law. She has also taught at the law schools at Michigan State University and the University of Denver (as a visiting professor); served as a visiting fellow at the Natural Resources Law Center at the University of Colorado School of Law; and worked in the Natural Resources Section of the Colorado Attorney General's Office. Professor Klein has published twenty

law review articles on topics involving natural resources law, including water law; co-written a textbook on natural resources law; and written two monographs on Florida water law. She has also served on the National Research Council's Committee on Sustainable Water and Environmental Management in the California Bay Delta and the Panel to Review California's Draft Bay Delta Conservation Plan.

Amicus Michael Pappas is an assistant professor of law at the University of Maryland Francis King Carey School of Law. His scholarship explores the balance between governmental responsibilities and private rights in managing natural resources such as energy sources, freshwater and coastal environments, fisheries, and food sources. Professor Pappas previously served as a Forrester Fellow and Instructor in Legal Writing at Tulane University Law School, where he also taught international and domestic fisheries law. In addition, Professor Pappas has taught natural resources law at Loyola University New Orleans College of Law, and he has served as an instructor for the U.S. Army Corps of Engineers PROSPECT Training Program, where he taught environmental law and regulation.

Amicus Joseph F. Zimmerman is a professor of political science in the Rockefeller College of Public Affairs and Policy at the State University of New York at Albany. His scholarship and teaching focus on federalism, state and local governments, and public administration. Professor Zimmerman has published extensively on those topics, including recent books entitled *Interstate Water Compacts: Intergovernmental Efforts to Manage America's Water Resources*, and *Interstate Cooperation: Compacts and Administrative Agreements*. Last year, Professor Zimmerman's book, *Horizontal Federalism: Interstate Relations*, won a Choice Award for Outstand-

ing Academic Title. He has also served on the advisory board for the National Center for Interstate Compacts.

In their academic work, amici have closely studied interstate compacts—and, specifically, interstate compacts allocating water rights. Amici believe that the sound interpretation of interstate compacts is critically important because such compacts significantly affect the distribution of natural resources and interstate relations. Amici file this brief to provide the Court with additional insights, based on their own experience, concerning the principles that appropriately govern the interpretation of interstate compacts.

SUMMARY OF ARGUMENT

I. The court of appeals correctly construed the Red River Compact not to confer a cross-border right.

A. States have a paramount sovereign interest in their own water. They hold an absolute right to the navigable waters within their borders, subject only to limitations subsequently imposed by the Constitution and Congress. The States have a similar sovereign interest in non-navigable waters within their borders, which they must preserve and use for the benefit of their citizens.

Because a State's authority over water within its borders is deeply rooted in state sovereignty, conveyance of that authority is not to be lightly assumed. As this Court has explained, such a conveyance should be recognized only where a State has expressly made it. And even then, such a conveyance should be narrowly construed. Although the Court has expressly applied those interpretive principles only when considering conveyances of state authority over navigable waters, the rationales for those principles apply with equal force to non-navigable waters as well. And applying those principles makes good practical sense, because a State's con-

veyance of authority over water within its borders raises a host of complex ancillary issues on which clear guidance is a practical necessity.

B. When States enter into compacts whereby one State permits another to cross its border for the purpose of diverting or storing water found there, they convey that authority clearly, not by implication. And they typically also set out highly detailed terms that resolve issues ancillary to such a conveyance. We are unaware of any compact that conveys the authority to cross a state border for the purpose of taking water found there only by implication, and petitioner cites none. It would therefore be entirely consistent with current practice to apply clear-statement and narrow-construction principles when considering conveyances of state authority of intrastate water.

C. Because the Red River Compact includes no clear statement, it should not be construed to authorize Texas, through the Tarrant Regional Water District, to cross Oklahoma's border for the purpose of taking water. The Red River Compact contains no language expressly authorizing one State to cross into another for the purpose of taking water found there—much less does it contain any language setting out the terms governing such a conveyance. And there is nothing in the compact's drafting history, or in the signatory States' post-compact course of dealing, to suggest that the States intended to convey those rights. Petitioner points to the *absence* of language in the compact expressly *prohibiting* the exercise of cross-border rights. But mere silence provides an insufficient basis for inferring a State's intent to convey some of its sovereign authority over water within its borders. Adopting petitioner's construction would create uncertainty about how such cross-border rights would operate and how the relevant provision of the compact

would interact with other provisions that unquestionably do not confer any cross-border rights. In the end, there is no good reason for this Court to create those rights by inference—and ample reasons not to.

II. Finally, the dormant Commerce Clause has no relevance to this case. Instead, this case begins and ends with the meaning of the compact. If the Tenth Circuit is correct about the interpretation of the compact, petitioner has no right to cross Oklahoma's border to extract water. If, contrary to our view, petitioner is correct, then Oklahoma's laws would be preempted and could not prevent the assertion of Texas's rights under the compact, including the right to cross another State's border. Either way, interpretation of the compact resolves petitioner's claim, and the dormant Commerce Clause has no independent operative effect.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONSTRUED THE RED RIVER COMPACT NOT TO CONFER A CROSS-BORDER RIGHT

A. A State Possesses Sovereign Authority Over Water Within Its Borders And Does Not Cede Its Interest In That Water Absent A Clear Statement To The Contrary

1. As this Court has noted, "few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished." *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 356 (1908). Members of the Court have described control over water within a State's borders as a "quintessential" exercise of state power. See, *e.g.*, *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006) (plurality opinion). And a State's authority over water within its

borders is exclusive and plenary, subject only to any limitations imposed by the Constitution or other federal law. See *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 955 (1982); *North Shore Boom & Driving Co.* v. *Nicomen Boom Co.*, 212 U.S. 406, 412 (1909); *Sands* v. *Manistee River Improvement Co.*, 123 U.S. 288, 295 (1887).

With respect to navigable waters, a State holds "absolute right" both to the waters themselves and to the beds beneath them. *PPL Montana, LLC* v. *Montana*, 132 S. Ct. 1215, 1227 (2012) (citation omitted). Indeed, that authority is an "essential attribute of [state] sovereignty." *Utah Div. of State Lands* v. *United States*, 482 U.S. 193, 195 (1987). As the Court has explained, at the time of independence, the original colonies "became themselves sovereign" and thereby obtained "the absolute right to all their navigable waters, and the soils under them, for their own common use." *Martin* v. *Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842). Through the equal-footing doctrine, the Constitution conferred the same sovereign authority on States later admitted to the Union, such as Oklahoma and Texas. See *PPL Montana*, 132 S. Ct. at 1227.

Although the Court has typically confronted questions involving state authority over intrastate water in the context of navigable waters, it is clear that a State retains sovereign authority over non-navigable waters within its borders as well. As the Court noted in rejecting the federal government's assertion of jurisdiction over ponds within a State's borders, the States have "traditional and primary power over * * * water use" more generally. *Solid Waste Agency* v. *Army Corps of Engineers*, 531 U.S. 159, 174 (2001); cf. *Phillips Petroleum Co.* v. *Mississippi*, 484 U.S. 469, 484 (1988) (citing the "general proposition" that "the law of real property is, under our Constitution, left to the individual States to

develop and administer"). A State's authority over non-navigable fresh waters is of "ancient origin"; the roots of that authority "trace to Roman civil law," and the principle that the government possesses that authority "can be found in the English common law." *PPL Montana*, 132 S. Ct. at 1234-1235. As state courts have put it, "all waters within [a State], not just those waters considered navigable under the federal test, are held in trust by the State for the public," *Parks* v. *Cooper*, 676 N.W.2d 823, 838-839 (S.D. 2004); "[s]uch water * * * is *publici juris* or belongs to the public," *Northport Irrigation Dist.* v. *Jess*, 337 N.W.2d 733, 738 (Neb. 1983). And a State's authority over water within its borders gives rise to a concomitant duty: *viz.*, "to control and conserve the use of [the water] for the benefit of all *its* inhabitants." *City of Trenton* v. *New Jersey*, 262 U.S. 182, 184-185 (1923) (emphasis added).

2. Because a State's authority over water within its borders is deeply rooted in state sovereignty, conveyance of that authority, even to another State, is not to be lightly assumed. As this Court has explained, such a conveyance should be recognized only where a State has expressly made it. And even then, such a conveyance should be narrowly construed.

a. In the context of navigable waters, the Court has stated that any question of title "must * * * begin with a strong presumption against defeat" of that title. *United States* v. *Alaska*, 521 U.S. 1, 34 (1997) (alteration in original) (internal quotation marks and citation omitted). That presumption, in turn, cannot be overcome "unless the intention was definitely declared or otherwise made very plain." *Ibid.* (quoting *United States* v. *Holt State Bank*, 270 U.S. 49, 55 (1926)); see *United States* v. *Oregon*, 295 U.S. 1, 14 (1935).

In addition, even where a State's intent to convey some of its sovereign authority over navigable waters is plain, the Court has explained that the scope of that conveyance should be strictly construed. As the Court has noted, "wherever there is a grant by a state having plenary power to make it, of the rights and title of government and sovereignty over a specified territory," such a grant "must be construed so as to diminish the public rights of the sovereign only so far as is made necessary by an unavoidable construction." *Massachusetts* v. *New York*, 271 U.S. 65, 89 (1926).

b. Although the Court has not expressly applied similar clear-statement and narrow-construction principles when considering conveyances of state authority over non-navigable waters, the rationales for those principles apply with equal force. Regardless of the navigability of the waters, a court is construing "grants by or to a sovereign government as distinguished from private grants." *Massachusetts*, 271 U.S. at 89. And where a conveyance of sovereign authority is concerned, "any ambiguity in the terms of the contract[] must operate against the [grantee], and in favor of the public, and the [grantee] can claim nothing that is not clearly given them by the [conveying instrument]." *Charles River Bridge* v. *Warren Bridge*, 36 U.S. (11 Pet.) 420, 544 (1837). That is because "the whole community ha[s] an interest in preserving * * * undiminished" property that a State holds in its capacity as a sovereign, and "the community ha[s] a right to insist * * * that its abandonment ought not to be presumed[] in a case[] in which the deliberate purpose of the state to abandon it does not appear." *Id.* at 547-548 (internal quotation marks omitted).

Because a State's authority over non-navigable waters within its borders, like its authority over navigable waters, is rooted in state sovereignty, a conveyance of

that authority should be subject to the same clear-statement and narrow-construction rules. See generally *Solid Waste Agency*, 531 U.S. at 174 (requiring a clear statement from Congress before it could assert federal jurisdiction over ponds within a State's borders); *College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 682 (1999) (holding that a "constructive" waiver of state sovereign immunity was insufficient); *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-461 (1991) (explaining that the clear-statement rule for laws altering the federal-state balance is "nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme").[2]

c. Applying clear-statement and narrow-construction rules to conveyances of state authority over intrastate water not only respects state sovereignty, but makes good practical sense. That is particularly true where, as here, one State is alleged to have conveyed to another State the right to take water from within its borders. Such a conveyance raises a host of complex ancillary issues, such as which State's laws would govern the waters and adjacent lands; how the receiving State should compensate the granting State for its water; where diversions of the water should be taken; and how the power of eminent domain would be exercised. Cf. *California* v. *United States*, 438 U.S. 645, 668-669 (1978) (noting the "legal confusion that would arise if federal water law and state water law reigned side by side in the

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[2] Because amici believe that the navigability of intrastate waters has no bearing on the application of clear-statement and narrow-construction rules to conveyances of state authority over those waters, amici take no position on the navigability of the waters at issue here.

same locality"). Where the agreement at issue fails to provide clear guidance on the existence and scope of such a conveyance, it would likely also fail to provide guidance on those ancillary issues—thus forcing courts to resolve those issues based on nothing more than inferences about the States' intent.

B. Where States Wish To Provide Cross-Border Rights To Water Within Their Borders, They Do So By Making Clear Statements To That Effect

1. Applying clear-statement and narrow-construction rules to conveyances of state authority over intrastate water would also be consistent with historical practice. When States have entered into compacts whereby one State permits another to cross its border for the purpose of diverting or storing water found there, they have conveyed that authority clearly, not by implication. See, *e.g.*, Amended Bear River Compact, Pub. L. No. 96-189, art. VII, 94 Stat. 4, 12 (1980) (noting that "[i]t is the policy of the signatory States to encourage additional projects for the development of the water resources" and providing that "authority is granted within the limitations provided by this Compact, to investigate, plan, construct, and operate such projects without regard to State boundaries"); Arkansas River Basin Compact, Arkansas-Oklahoma, Pub. L. No. 93-152, art. VI(A), 87 Stat. 569, 571 (1973) (specifying that "[e]ach State may construct, own and operate for its needs water storage reservoirs in the other State"); Amended Costilla Creek Compact, Pub. L. No. 88-198, art. III(2), 77 Stat. 350, 353 (1963) (providing that "[e]ach State grants for the benefit of the other * * * the rights * * * to divert water from the stream in one State for use in the other and to store water in one State for the irrigation of lands in the other"); Upper Colorado River Basin Compact, Pub. L. No. 81-37, art. IX(a), 63 Stat. 31, 37 (1949) (stating that "no

State shall deny the right of another signatory State * * * to acquire rights to the use of water, or to construct or participate in the construction and use of diversion works and storage reservoirs with appurtenant works, canals and conduits in one State for the purpose of diverting, conveying, storing, regulating and releasing water"); South Platte River Compact, Pub. L. No. 69-37, art. VI(1), 44 Stat. 195, 198 (1926) (specifying that "Colorado shall have the right to maintain, operate, and extend, within Nebraska, the Peterson Canal and other canals of the Julesburg irrigation district").

Notably, where compacts authorize one State to cross into another State for the purpose of taking water found there, they typically also set out highly detailed terms that address the respective States' rights and obligations and resolve other potentially complex issues ancillary to the conveyance. Thus, for example, such compacts specify who can assert cross-border water rights, see Kansas-Nebraska Big Blue River Compact, Pub. L. No. 92-308, art. VII(1), 86 Stat. 193, 198 (1972) (stating that "[t]he right of the state of Kansas or of any person, corporation, local agency, or entity in Kansas to construct or participate in the future construction and use of any storage reservoir or diversion works in the Big Blue and Little Blue Basins of Nebraska for the purpose of regulating water to be used in Kansas shall never be denied"); they detail the permitted uses of the water by the State asserting the cross-border right, see Amended Bear River Compact, art. VI(B), 94 Stat. 11 (providing for cross-border water storage); they explain the circumstances under which the cross-border right is triggered, see Rio Grande Compact, Pub. L. No. 76-96, art. IX, 53 Stat. 785, 790 (1939) (providing for diversion from the San Juan River if the United States or New Mexico decided to construct works for diverting water to Rio

Grande River); they set out how the cross-border right is to be exercised, see South Platte River Compact, art. VI, 44 Stat. 198 (specifying that Nebraska could build a canal diverting water from South Platte River "from the town of Ovid, Colorado, and * * * thence easterly through Colorado" and detailing protocol for use of the canal); they articulate the justifications for granting cross-border access, see Amended Bear River Compact, art. VII, 94 Stat. 12 (citing policy of promoting beneficial use); and they detail how the cross-border right would be administered, see Arkansas River Basin Compact, Kansas-Oklahoma, Pub. L. No. 89-789, art. VII(A), 80 Stat. 1409, 1411 (1966) (providing that "[t]he commission [established by the compact] shall determine the conditions under which one state may construct and operate for its needs new conservation storage capacity in the other state").

Compacts that grant cross-border rights also address such potentially sensitive issues as cost allocation, see Belle Fourche River Compact, Pub. L. No. 78-236, art. VI, 58 Stat. 94, 97 (1944) (requiring cross-border users to pay the locality where the water or works used are located); eminent-domain power, see Republican River Compact, Pub. L. No. 78-60, art. VII, 57 Stat. 86, 89 (1943) (allowing the downstream State "to acquire necessary property rights in an upper State by purchase, or through the exercise of the power of eminent domain"); and choice of law, see Snake River Compact, Pub. L. No. 81-464, art. VIII(C), 64 Stat. 29, 33 (1950) (specifying that, "[s]hould any facility be constructed in either State by and for the benefit of the other State, * * * the construction, repair, replacement, maintenance and operation of such facility shall be subject to the laws of the State in which the facility is located"). And such compacts also explain the impact that any cross-border right

has on the States' bargained-for allocation of water. See Arkansas River Compact, Pub. L. No. 81-82, art. VI(B), 63 Stat. 145, 149 (1949) (providing that "[w]ater carried across the Stateline in the Frontier Canal or any other similarly situated canal shall be considered to be part of the Stateline flow").

Perhaps not surprisingly, given the different circumstances that give rise to interstate compacts, there is considerable variation in the terms of compacts that grant cross-border rights. Thus, for example, some compacts permit the State asserting the cross-border right to exercise the power of eminent domain, see Snake River Compact, art. VIII(B), 64 Stat. 32-33 (providing that "[e]ither State shall have the right to acquire * * * property rights * * * in the other State by donation, purchase or through the exercise of the power of eminent domain"), while others do not, see Arkansas River Basin Compact, Arkansas-Oklahoma, art. VI(A), 87 Stat. 571 (stating that "nothing contained in this Compact * * * shall be interpreted as granting either State * * * the right or power of eminent domain in any manner whatsoever outside the borders of its own State"). Some compacts allow one State to cross into the other State for storage, see Amended Bear River Compact, art. VI(B), 94 Stat. 11 (providing that "Idaho is granted an additional right to store 4,500 acre-feet of Bear River water in Wyoming or Idaho for use in Idaho"), while others allow one State to divert water from another, see South Platte River Compact, art. VI(1), 44 Stat. 198 (permitting cross-border water diversion), and still others provide for both storage and diversion, see Amended Costilla Creek Compact, art. III(2), 77 Stat. 353 (providing that "[e]ach State grants for the benefit of the other * * * the rights * * * to divert water from the stream in one State for use in the other and to

store water in one State for the irrigation of lands in the other"). And some compacts make the right to construct storage reservoirs or diversion works absolute, see Kansas-Nebraska Big Blue River Compact, art. VII(1), 86 Stat. 198 (establishing that "[t]he right * * * to construct or participate in the future construction and use of any storage reservoir or diversion works * * * shall never be denied"), while others condition that right on the approval of a compact commission, see Arkansas River Basin Compact, Kansas-Oklahoma, art. VII(A), 80 Stat. 1411 (providing that "[t]he commission shall determine the conditions under which one state may construct and operate for its needs new conservation storage capacity in the other state").

2. We are unaware of any compact that conveys the authority to cross a state border for the purpose of taking water found there only by implication, and petitioner cites none. That is not surprising, because a State cedes "an essential attribute of sovereignty," *United States* v. *Alaska*, 521 U.S. 1, 5 (1997), when it allows another State to enter its land and take water. States should not be held to have done so silently or unwittingly, but instead only where it is clear that the States have agreed to such a conveyance and set out terms governing the cross-border arrangement. Application of clear-statement and narrow-construction rules to conveyances of state authority over intrastate water serves to protect sovereign interests while at the same time ensuring ease and consistency of interpretation of interstate compacts.

C. Because The Red River Compact Contains No Clear Statement, It Does Not Authorize Texas To Cross Oklahoma's Border For The Purpose Of Taking Water

1. Unlike the compacts discussed above, the Red River Compact contains no language expressly authorizing one State to cross into another for the purpose of

taking water found there—much less setting out the terms governing such a conveyance. The critical provision of the compact, Section 5.05(b)(1), specifies that, as long as the Red River's flow at the Arkansas-Louisiana border exceeds 3000 cubic feet per second (cfs), "[t]he Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, * * * provided no state is entitled to more than 25 percent of the [excess] water." 94 Stat. 3311. That provision does not convey any sort of entitlement from one State to another, much less does it expressly grant any State the right to cross into another for the purpose of taking water found there. Instead, by its plain terms, Section 5.05(b)(1) merely imposes a *restriction* on a State's use of Reach II, Subbasin 5, water to which the State already has access, by preventing any of the four signatory States from using more than 25% of excess water above the 3000-cfs threshold. And Section 5.05(b)(1) is completely silent on any of the ancillary issues that one would expect the compact to address if it were conveying cross-border rights, such as which State's laws would govern the waters and adjacent lands; where diversions of the water should be taken; and how the power of eminent domain would be exercised.

2. Not only is the text of the compact silent on the issue of whether it conveys cross-border rights, but there is nothing in the compact's drafting history, or in the signatory States' post-compact course of dealing, to suggest that the States intended to convey those rights. As to the drafting history: none of the drafts contained a provision expressly conveying cross-border rights to the water in Reach II, Subbasin 5—or, for that matter, any of the other reaches or subbasins that the compact covers. And although the States seemingly conducted exhaustive debates on nearly every other pertinent issue, it

does not appear that the States ever discussed the issue of whether one State could cross the border of another State for the purpose of taking water subject to the compact. The better view, therefore, is that the States did not "hide elephants in mouseholes," *Whitman* v. *American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001), and negotiated and drafted the compact on the assumption that it did not convey cross-border rights. See, *e.g.*, Marguerite A. Chapman, *Where East Meets West in Water Law: The Formulation of an Interstate Compact to Address the Diverse Problems of the Red River Basin*, 38 Okla. L. Rev. 1, 67, 72 (1985) (explaining that, in drafting the Red River Compact, the drafters studied other compacts that expressly provided cross-border rights, some of which the drafters had themselves been involved in negotiating).

As to the States' course of dealing: the States' post-compact conduct confirms that the compact was not intended to alter the background presumption that the States retained sovereign authority over the waters within their respective borders. The States' course of dealing is "highly significant" in interpreting the compact's terms. *Alabama* v. *North Carolina*, 130 S. Ct. 2295, 2309 (2010). As an initial matter, before petitioner sought to cross into Oklahoma to take water, none of the States had asserted a right to do so. To the contrary, when a Texas agency previously sought to access water in Oklahoma, it offered to *purchase* the water in amounts potentially exceeding a billion dollars; no State had the chutzpah to lay claim to the water for free. See 2 J.A. 347, 362-366, 376; U.S. Br. 28.

In addition, the States consistently devised regulations seemingly operating on the assumption that they possessed no rights to cross borders for purposes of taking water in Reach II, Subbasin 5. For example, Texas's

own proposed in-state compliance rules defined Reach II, Subbasin 5, to cover "[t]hat portion of the Red River *in Texas*[,] together with its tributaries, from Denison Dam down to the Arkansas-Louisiana state boundary." Proposed Rules of the Texas Water Commission, Introductory Provisions, at 2 (Nov. 19, 1986) (Proposed Rules) (emphasis added). Similarly, Texas's proposed rules contemplated only "[a]llocation of the Texas share of water in the Red River or its Texas tributaries." *Id.* at 1. And those rules sought to regulate Texas permitholders, and to record diversions, only with regard to those Subbasin 5 waters that were contained within Texas's borders. Proposed Rules, Enforcement Regarding Reach II, Subbasin 5, at 1-2.

The Red River Compact Commission seemingly shared the understanding that the compact did not defeat the States' sovereign authority over waters within their borders. The Commission's interim rules, which remain in force today, provided that "[e]ach State will be responsible for insuring that the sum of the diversions by State users does not exceed the total State diversion authorized by the * * * Compact." 1 J.A. 54. Those rules further provided that "each State will be responsible of establishing clear legal authority *within its State* for enforcing the restrictions imposed" by the compact. *Ibid.* (emphasis added).

3. With nothing in the text, drafting history, or course of dealing to provide affirmative support for the proposition that the compact conveys cross-border rights, petitioner points to the *absence* of language in the compact expressly *prohibiting* the exercise of cross-border rights. See Pet. Br. 27 (noting that "[t]he Compact apportions Reach II, Subbasin 5 water without a word about state lines"). For the reasons discussed above, however, mere silence provides an insufficient ba-

sis for inferring a State's intent to convey some of its sovereign authority over water within its borders. Cf. *Alabama*, 130 S. Ct. at 2312-2313 (noting that "[w]e are especially reluctant to read absent terms into an interstate compact given the federalism and separation-of-powers concerns that would arise were we to rewrite an agreement among the sovereign States"); *Virginia* v. *Maryland*, 540 U.S. 56, 67 (2003) (stating that, "[i]f any inference at all is to be drawn from [a compact provision's] silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens"). This Court should reject petitioner's unprecedented reading of the compact, and the upside-down view of state sovereignty that such a reading entails.

In a related vein, petitioner contends (Br. 29) that, because other provisions of the compact contain express references to the allocation of water within state borders, the Court should attach significance to the States' failure to include similar language in Section 5.05(b)(1). To be sure, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983). But that interpretive principle carries little force where, as here, there is a background principle that cuts in the opposite direction—*viz.*, the principle that there is a "strong presumption against defeat" of a State's rights to water within its borders. *Alaska*, 521 U.S. at 34 (internal quotation marks and citation omitted). The existence of language elsewhere in the compact that merely confirms that presumption thus creates no inference about a provision that omits such language. To rely on the *Russello* principle here would

impermissibly raise the "negative pregnant" created by the silence in one provision of the compact "to the level of interpretive trump card." *Field* v. *Mans*, 516 U.S. 59, 67 (1995). Because Section 5.05(b)(1) lacks the clear statement required to convey state authority over intrastate water, there is no ambiguity for the *Russello* principle to resolve, and that principle is inapposite here.

In any event, petitioner's construction of the compact should be rejected on its own terms, because it creates far more problems than it solves. To begin with, the compact contains none of the more specific terms that one would naturally expect if the compact conveyed state authority over intrastate water. For example, the compact is silent as to how Texas would acquire Oklahoma's water, cf. Yellowstone River Compact, Pub. L. No. 82-231, art. VII(A), 65 Stat. 663, 668 (1951) (providing that "[a] lower signatory State shall have the right * * * to file application for and receive permits * * * to construct or participate in the construction and use of any dam, storage reservoir, or diversion works in [an] upper State for the purpose of conserving and regulating water that may be apportioned to or appropriated by the lower State"); where diversions of water should be taken, cf. South Platte River Compact, art. VI, 44 Stat. 198 (allowing construction of a canal "from the town of Ovid, Colorado, and * * * thence easterly through Colorado"); how the power of eminent domain would be exercised, cf. Klamath River Basin Compact, Pub. L. No. 85-222, art. VI(A), 71 Stat. 497, 501 (1957) (specifying that "[n]either state shall have any greater power to acquire property rights for the other state through the exercise of the power of eminent domain than it would have under its laws to acquire the same property rights for itself"); which State's laws would govern the waters and adjacent lands, cf. Snake River Compact, art. VIII(C), 64 Stat. 33

(providing that, "[s]hould any facility be constructed in either State by and for the benefit of the other State, * * * the construction, repair, replacement, maintenance and operation of such facility shall be subject to the laws of the State in which the facility is located"); and how Texas' acquisition of water would affect the remaining rights under the compact, cf. Arkansas River Basin Compact, Kansas-Oklahoma, art. VIII(D), 80 Stat. 1412 (stating that, "[s]hould a transbasin diversion of water of the Arkansas river basin be made in one state for the use and benefit of the other state or both states, the commission shall determine a proper accounting of new conservation storage capacities in each state").

Should the Court read a conveyance of cross-border rights into the compact—notwithstanding the absence of clear language to that effect in the compact itself—it would leave all of those ancillary issues open, creating uncertainty that could only be resolved through subsequent rounds of protracted and costly litigation. That uncertainty would frustrate one of the "principal purposes" of the compact: *viz.*, "[t]o promote interstate comity and remove causes of controversy between each of the affected states." Red River Compact, § 1.01(a), 94 Stat. 3305.

In addition, if this Court were to accept petitioner's construction of Section 5.05(b)(1), it would create difficulties with other provisions that would render the compact unworkable in practice. In particular, Sections 5.05(b)(2) and 5.05(c) of the compact govern water flow at low levels—and unquestionably do not confer any rights to cross borders for the purpose of taking water. If Section 5.05(b)(1) conferred such rights—with accompanying rights to build diversion plants, pipelines, and whatever other facilities would be required to effectuate the underlying cross-border rights, see Pet. Br. 29—it would

create a perverse regime under which the cross-border rights would exist only where the flow at the Arkansas-Louisiana border exceeds 3000 cfs. Any diversions using the cross-border infrastructure would constitute a violation of the compact at the moment the flow fell below 3000 cfs, and the violation would continue until the flow rose above 3000 cfs once again. Petitioner would presumably have to cease any diversions (and, arguably, to remove the accompanying infrastructure) during that time period, or else risk violating the compact—and, indeed, infringing Oklahoma's sovereignty. Petitioner cites no precedent for such a peculiar and unworkable regime. And in the absence of a clear indication that the signatory States intended such a regime, this Court should not create that regime by inference. The court of appeals correctly held that the Red River Compact does not authorize Texas to cross Oklahoma's border for the purpose of taking water.

II. THE DORMANT COMMERCE CLAUSE HAS NO BEARING ON THIS CASE

Finally, petitioner contends (Br. 47-55) that a series of Oklahoma water laws place an impermissible burden on interstate commerce and thus violate the dormant Commerce Clause. That contention has no force, because the dormant Commerce Clause has no relevance to this case.

A. Although the dormant Commerce Clause prohibits state laws that "discriminate[] against interstate commerce," *Department of Revenue* v. *Davis*, 553 U.S. 328, 338 (2008), Congress "may redefine the distribution of power over interstate commerce by permit[ting] the states to regulate the commerce in a manner which would otherwise not be permissible." *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82, 87-

88 (1984) (alteration in original) (internal quotation marks and citations omitted). That is for the simple reason that "[i]t would turn dormant Commerce Clause analysis entirely upside down to apply it where the Federal Government has acted, and to apply it in such a way as to *reverse* the policy that the Federal Government has elected to follow." *Wardair Canada, Inc.* v. *Florida Dep't of Revenue*, 477 U.S. 1, 12 (1986). This Court has noted that, "for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." *Wunnicke*, 467 U.S. at 91.

Article I, Section 10, of the Constitution requires that Congress ratify all interstate compacts. Once Congress does so, "an interstate compact is not just a contract; it is a federal statute enacted by Congress." *Alabama*, 130 S. Ct. at 2312. At that point, questions about the interpretation of the compact are questions of federal law; when it comes to the *interpretation* of a compact, the dormant Commerce Clause obviously has no part to play.

B. This case begins and ends with the meaning of the compact. If Section 5.05(b)(1) is read (as it should be) to foreclose any cross-border rights, then petitioner has no right to cross Oklahoma's border and take its water. Conversely, if petitioner were correct about the meaning of Section 5.05(b)(1), then any state law that is "inconsistent with [Oklahoma's] obligations under th[e] Compact" would be invalid. See Red River Compact, § 2.10(a), 94 Stat. 3307. Either way, interpretation of the compact resolves petitioner's claim, and the dormant Commerce Clause has no independent operative effect.

Petitioner suggests that, because "a majority of Subbasin 5 water is located in Oklahoma, * * * a substantial amount [of] the water located in Oklahoma is unallocated." Pet. Br. 47 n.13. If that were true, the dor-

mant Commerce Clause could conceivably come into play, because petitioner's claim would be for water that is not covered by the compact. Petitioner's suggestion, however, ignores the compact's plain language. Section 1.01(b) states that the purpose of the compact more generally is to apportion "among the Signatory States * * * the water of the Red River and its tributaries." 94 Stat. 3305. And Section 5.05(b) specifically allocates all "runoff originating in subbasin 5 and undesignated water flowing into subbasin 5." *Id.* at 3311. There are therefore no "unallocated" waters that could bring the dormant Commerce Clause into play. On its face, Section 5.05(b)(1) authorizes Oklahoma and Texas to use Subbasin 5 water up to 25% of the excess of the 3000-cfs threshold, but conveys no right to Texas to cross Oklahoma's border for the purpose of *accessing* Subbasin 5 water. Petitioner cannot invoke the dormant Commerce Clause to confer a right that the compact, by its plain terms, does not.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In The
Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,

Petitioner,

v.

RUDOLF JOHN HERRMANN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE REPUBLICAN RIVER WATER CONSERVATION DISTRICT AND THE RIO GRANDE WATER CONSERVATION DISTRICT AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Section 5.05(b)(1) of the Red River Compact, by providing that each state has "equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5 . . . , provided no state is entitled to more than twenty-five percent of the water," gives Texas water users the right to enter Oklahoma, construct diversion works, and transport water to Texas.

2. Whether the Commerce Clause of the United States Constitution applies to a dispute between Texas and Oklahoma regarding the allocation of water as provided for in the Red River Compact.

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STATEMENT OF INTEREST[1]

The Republican River Water Conservation District ("RRWCD") is a governmental entity created under Colorado law for the conservation, use, and development of the waters of the Republican River and to assist in Colorado's compliance with the Republican River Compact. Colo. Rev. Stat. § 37-50-101 through -142 (2012). The Republican River Compact allocates water of the Republican River between Colorado, Kansas, and Nebraska and was approved by Congress in 1943. Relevant here, the Republican River Compact provides that it is the "right of any person, entity or lower State to construct, or participate in the future construction and use of any storage reservoir or diversion works in an upper State for the purpose of regulating water herein allocated for beneficial consumptive use in such lower State, shall never be denied by an upper State; provided, that such right is subject to the rights of the upper State." Art. VI, 57 Stat. 86 (May 26, 1943). The Compact further states that "[a]ny person, entity, or lower State shall have the right to acquire necessary property rights in an upper State by purchase, or through the exercise of the power of eminent domain, for the

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[1] The parties have consented to the filing of *amicus* briefs. Pursuant to Rule 37.6, *amici* the Republican River Water Conservation District and the Rio Grande Water Conservation District affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

construction, operation and maintenance of storage reservoirs, and of appurtenant works, canals and conduits, required for the enjoyment of the privileges granted by Article VI. . . ." *Id.* Art. VII.

The Rio Grande Water Conservation District ("RGWCD") is a governmental entity created under the laws of Colorado for the conservation, use, and development of the water resources of the Rio Grande and its tributaries and to safeguard for Colorado all waters to which the State of Colorado is equitably entitled by the apportionment to Colorado under the Rio Grande Compact. Colo. Rev. Stat. § 37-48-101 through -195 (2012). The Rio Grande Compact is an agreement between Colorado, New Mexico, and Texas to apportion the waters of the Rio Grande Basin and was approved by Congress in 1939. Relevant here, the Rio Grande Compact provides that "Colorado agrees with New Mexico that in the event the United States or the State of New Mexico decides to construct the necessary works for diverting the waters of the San Juan River, or any of its tributaries, into the Rio Grande, Colorado hereby consents to the construction of said works and the diversion of water from the San Juan River, or the tributaries thereof, into the Rio Grande in New Mexico, provided the present and prospective uses of water in Colorado by other diversions from the San Juan River, or its tributaries, are protected." Art. IX, 53 Stat. 785 (May 31, 1939).

The RRWCD and the RGWCD have an interest in ensuring the language of the Compacts under which they operate is respected and interpreted according to the intent of the parties. Additionally, if this Court chooses to go beyond an interpretation of the Red River Compact and address Petitioner's dormant Commerce Clause arguments, any resulting ruling could have a substantial impact on the construction and enforceability of other interstate compacts, including the Republican River Compact and the Rio Grande Compact. The RRWCD and the RGWCD file this *amicus* brief to protect their interest in having their governing compacts interpreted according to their terms and urge the Court to avoid an unnecessary ruling on a constitutional question.

SUMMARY OF ARGUMENT

The Red River Compact gives the signatory states "equal rights" to the use of "no more than twenty-five percent" of Reach II, Subbasin 5 water. Petitioner Tarrant Regional Water District ("Tarrant") believes this provision gives Texas (and those seeking to use water apportioned to Texas under the Compact) the right to appropriate Texas's share of Subbasin 5 water from within Oklahoma. However, a review of interstate water compacts drafted and entered into prior to the Red River Compact, including the Republican River Compact and the Rio Grande Compact,

confirms that when the compacting states intended to allow one state[2] to appropriate water from within another compacting state, they used specific language and included provisions to address potential issues that could arise. In the absence of more explicit provisions, the "equal rights" language of the Red River Compact does not by itself evidence intent for Tarrant to be able to enter Oklahoma and transport up to twenty-five percent of Subbasin 5 water to Texas. Moreover, if the Compact is read according to Tarrant's interpretation, then the signatory states agreed to allow significant intrusions and limitations on their ability to safeguard the water allocated to them, without explicitly stating so. In the absence of specific language allowing one compacting state to appropriate water in another compacting state, this Court should adopt a presumption that the parties intended each state to appropriate water only within its own borders. This presumption would protect the ability of compacting states to control, plan for, and oversee the water allocated to them within their own borders.

Additionally, although one of the issues before the Court involves the dormant Commerce Clause, this Court need not address the Commerce Clause issue to resolve this case. If, under the language of

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[2] In this context a state would include those non-state persons or entities who want to appropriate water in one of the compacting states for use in another compacting state. For simplicity, we will simply refer to a state.

the Compact, the Court decides Texas cannot appropriate water within Oklahoma, then the Commerce Clause is not implicated. And if the Court decides Texas can appropriate Subbasin 5 water in Oklahoma, then the question should be whether Oklahoma's statutes are violative of the Compact or whether the Compact preempts them.

ARGUMENT

I. This Court should interpret the Red River Compact according to its terms, which do not include the right of Texas to enter Oklahoma to appropriate Subbasin 5 water.

The RRWCD and RGWCD will not repeat the Compact interpretation arguments fully briefed by Tarrant, Respondent Rudolph James Hermann *et al.* (collectively "OWCB"), and numerous *amici*. However, the RRWCD and the RGWCD wish to clarify several points related to Compact language. The RRWCD and the RGWCD urge the Court to recognize that other interstate water apportionment compacts have explicitly addressed the right of one state to enter another state to construct diversion works or storage reservoirs necessary to appropriate waters allocated for beneficial use by the compact. Due to the strong interest states have in maintaining control over the water allocated to them through an interstate compact, the RRWCD and RGWCD propose the Court adopt a presumption that the parties to a water

apportionment Compact do not intend to allow one state to enter another to appropriate water unless that is the clear and explicit intention of the parties.

A. The parties to the Red River Compact should have been aware that numerous prior compacts had explicitly addressed the issue of whether one state may enter another state to appropriate compact water.

In drafting the Red River Compact, Oklahoma, Texas, Arkansas, and Louisiana were not pioneering new territory. Congress approved the Compact in 1980. Red River Compact, 94 Stat. 3305 (December 22, 1980). By that time, numerous other water apportionment compacts, including the Republican River Compact and the Rio Grande Compact, had addressed many of the same issues that were likely to arise in the drafting and administration of the Red River Compact. More specifically, the parties to prior compacts foresaw the need to address the issue of whether one compacting state could appropriate water within the borders of another compacting state, as well as the issue of whether diversion works or reservoirs could be constructed in one compacting state to appropriate water for beneficial use in another compacting state.

Prior compacts addressed these issues through explicit provisions regarding one state's appropriation of compact water in another state, securing land necessary for such an appropriation, and even the

payment of fees or taxes to the subdivisions of that state to compensate for the existence of the diversion works, structures, and land. *See, e.g.*, Upper Colorado River Compact, Art. IX(a)-(d), 63 Stat. 31 (April 6, 1949) (providing one state may construct diversion works in another, acquire property rights necessary to such use of the water, and requiring the payment of an annual sum equal to the amount of taxes assessed against the lands during the preceding ten years); Republican River Compact, Art. VII, 57 Stat. 86 (same); Rio Grande Compact, Art. IX, 53 Stat. 785 (allowing the United States and New Mexico to construct diversion works in Colorado).

Thus, the issue of whether one compacting state could appropriate water in another was, at the time the Red River Compact was negotiated and drafted, widely recognized as an issue that could be addressed in the compact. Yet the drafters of the Red River Compact chose not to include any provisions explicitly related to one state's ability to appropriate water from within another state. Instead, the Red River Compact provides, in relation to Subbasin 5 water, that "[t]he signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5 so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more, provided no state is entitled to more than twenty-five percent of the water in excess of 3,000 cubic feet per second." Red River Compact, § 5.05(b)(1), 94 Stat. 3305. Tarrant contends that the

"equal rights" language of this provision has the same effect as the much more specific language of the Upper Colorado River, Republican River, and Rio Grande Compacts. Indeed, Tarrant believes its rights are even broader under the Red River Compact because there are no explicit limits on the location or manner of its appropriations. Tarrant offers no explanation as to why the drafters would rely on a vague statement regarding "equal rights" instead of following the lead of other interstate water compacts addressing the same issue. On this point, the Tenth Circuit held that "'equal rights to the use of' [Subbasin 5 water] can reasonably be read to mean that each signatory state has the same opportunity and entitlement to use up to 25 percent of the excess water in its state and under its state laws." *Tarrant Regional Water Dist. v. Herrmann*, 656 F.3d 1222, 1246 (10th Cir. 2011).

Tarrant argues that the parties' intent to allow Texas to appropriate water in Oklahoma is clear from the language of the Compact. But when viewed against the language used in other compacts where states explicitly addressed this issue, the intent of the parties regarding the right of Texas to enter Oklahoma and appropriate water is not clear, and it is certainly not explicit.

B. If the parties to the Compact had intended to allow Texas to appropriate Reach II, Subbasin 5 water in Oklahoma, they would have specifically done so.

Each state entering into an interstate water compact has an interest in protecting its ability to use the water allocated to it under the compact. It should be expected that if a state intends to place its allocation of water at risk by allowing another state to appropriate water within its borders, it would be explicit about the extent and limits of the other state's rights. This is why the drafters of prior compacts insisted that a state's allocation be protected in the event another compacting state sought to appropriate water from within its borders. *See, e.g.*, Republican River Compact, Art. VI, 57 Stat. 86 (providing that the right of a lower state to appropriate water in an upper state is "subject to the rights of the upper state"); Rio Grande Compact, Art. IX, 53 Stat. 785 (allowing New Mexico or the United States to appropriate water from the San Juan Basin, "provided the present and prospective uses of water in Colorado by other diversions from the San Juan River, or its tributaries, are protected"); Upper Colorado River Compact, Art. IX(a), 63 Stat. 31 (The right to enter another state to obtain compact water "shall be subject to the rights of water users [in that state] to receive and use water" as apportioned by the compact.).

In this case, it appears that if Texas, Arkansas, and Louisiana appropriated their share of Subbasin 5

water in Oklahoma, Oklahoma would be deprived of its right and ability to use *any* Subbasin 5 water flowing within its own borders.[3] Equally troubling, Tarrant's interpretation of the Compact would allow Texas to enter Oklahoma (and, presumably Arkansas) and appropriate water even if Texas has not appropriated the Subbasin 5 water flowing within Texas. Finally, implicit in Tarrant's argument is also a concession that Oklahoma, Arkansas, and Louisiana are free to enter Texas and appropriate up to twenty-five percent of Subbasin 5 water, even if that comprises the entire amount flowing in the Texas portion of Subbasin 5. Surely if the Compact's drafters had intended such significant intrusions on the states' ability to use their apportionments under the Red River Compact, they would have followed the lead of prior compacts that explicitly allowed one state to appropriate water in another, subject to explicit limitations.

C. If a compact does not address whether one state may appropriate water from within another state, this Court should apply a presumption that the parties did not intend to allow it.

The Red River Compact does not explicitly allow Texas to appropriate its share of Subbasin 5 water in

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[3] Tarrant cites to a 1970 engineering report that purportedly shows that, at most, fifty-nine percent of Subbasin 5 water flows from Oklahoma. Pet'r Br. 9 n.5.

Oklahoma. An interpretation of the Compact that Texas's "equal right" to excess Subbasin 5 water allows Texas to enter Oklahoma and appropriate water in that state (without even attempting to use whatever portion of Subbasin 5 water is available in Texas) would sanction the improbable position that a compacting state intended to allow such appropriations without explicitly stating so in the compact and without protecting its right to obtain its apportionment within its own borders before such an appropriation was made by another compacting state. It is for precisely these reasons that the Rio Grande Compact and the Republican River Compact (and numerous other interstate water compacts) are explicit. Rio Grande Compact, Art IX, 53 Stat. 785 (stating "Colorado hereby consents" to the construction of diversion works); Republican River Compact, Art. VI, 57 Stat. 86 (providing that the right of any lower state to enter an upper state "shall never be denied by an upper State"); Upper Colorado River Compact, Art. IX(a), 63 Stat. 31 ("[N]o State shall deny the right of another signatory State, any person, or entity of any signatory State to acquire rights to the use of water" in an upper signatory state for use in a lower signatory state.).

Recognizing the important interests at play, this Court should hold that unless a compact specifically provides for the right of one state to enter another state for purposes provided for by the compact (*e.g.*, to appropriate water, construct reservoir and diversion structures, or acquire property), the Court will presume the parties intended to retain control over the

land and water resources within their own borders so as to ensure that each compacting state has the ability to obtain the water apportioned to it by the compact. A contrary rule would threaten a state's ability to appropriate and enjoy the benefit of the water allocated to it.[4]

II. Once the Court interprets the Red River Compact, it need not address Tarrant's arguments on the dormant Commerce Clause.

In this Court and the courts below, Tarrant argued that statutes enacted by Oklahoma related to the appropriation of Oklahoma water by out-of-state water users violate the dormant Commerce Clause. *See Tarrant Regional Water Dist. v. Herrmann*, No. CIV-07-0045-HE, 2009 WL 3922803, *1 (W.D. Ok. November 18, 2009); *Tarrant Regional Water Dist.*, 656 F.3d at 1232. Tarrant made these arguments for both water apportioned to Texas under the Compact

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[4] This Court has previously indicated that a similar presumption is appropriate. *See Virginia v. Maryland*, 540 U.S. 56, 67, 124 S. Ct. 598, 605, 157 L. Ed. 2d 461 (2003) (holding that when sovereignty exists, the Court would apply a strong presumption against reading a compact as stripping that authority); *Com. of Massachusetts v. State of New York*, 271 U.S. 65, 89, 46 S. Ct. 357, 361, 70 L. Ed. 838 (1926) (holding a state's dominion over navigable waters and underlying land "are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged. . .").

and for Tarrant's attempt to appropriate non-Compact Oklahoma water.[5] The district court and the Tenth Circuit addressed Tarrant's arguments, apparently believing that their resolution was necessary to the outcome of the case. The district court focused on whether Congress, by signing and approving the Compact, showed an intent to supplant the restrictions of the Commerce Clause. *Tarrant Regional Water Dist.*, 2009 WL 3922803 at *6. The Tenth Circuit stated that it "must examine the relationship between the Compact and the Oklahoma water statutes to decide whether Congress has displaced the restrictions of the dormant Commerce Clause." *Tarrant Regional Water Dist.*, 656 F.3d at 1236. The Tenth Circuit agreed with the district court that Oklahoma's statutes are consistent with the Compact but then further held that the language of the Compact itself provides congressional consent for the statutes.[6] *Id.* at 1239.

OWRB has taken the position, at least in relation to Compact water, that the Compact itself does not allow Tarrant to appropriate Subbasin 5 water in Oklahoma. Resp't Br. 34-45. If OWRB is correct regarding the meaning of the Compact (and *amici* believe it is), then Texas cannot appropriate its

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[5] Tarrant's attempt to appropriate non-Compact water from Oklahoma is not at issue in this appeal.

[6] The Tenth Circuit explicitly declined to address whether the statutes would be constitutional under the dormant Commerce Clause in the absence of the Compact. *Tarrant Regional Water Dist.*, 656 F.3d at 1239.

Subbasin 5 water in Oklahoma, and the Commerce Clause is not implicated. On the other hand, if Tarrant is correct that under the Compact Texas can appropriate Subbasin 5 water in Oklahoma, then an Oklahoma law that interferes with Texas's ability to do so should be analyzed based on whether it violates the Compact or under a preemption analysis, but not under the dormant Commerce Clause. With either analysis, this Court can, and should, avoid any holding based upon the dormant Commerce Clause. *See Jean v. Nelson*, 472 U.S. 846, 854 (1985) (holding that federal courts should not decide constitutional issues unnecessarily).

Because this case involves a Compact, it is far-removed from the situation in *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 960 (1982), cited extensively by Tarrant. In *Sporhase*, a water user appropriated groundwater from within Nebraska and exported it out of state, despite a Nebraska statute prohibiting the transport of groundwater out of the state unless there was a reciprocity agreement with the state receiving the groundwater. *Id.* at 944. The Court held the facially discriminatory statute violated the dormant Commerce Clause. *Id.* at 960. The Court, and the parties in the *Sporhase* litigation, assumed there was no interstate Compact covering the groundwater at issue, so the analysis in that case involved a relatively straightforward application of the dormant Commerce Clause. In contrast, the Red River Compact was intended to apportion the waters of the Red River among the compacting states. If the Compact

does allow Texas to appropriate Subbasin 5 water within Oklahoma, any laws restricting such appropriation would be problematic not because of the dormant Commerce Clause as interpreted in *Sporhase*, but because they would be contrary to an agreement contained in an interstate Compact approved by Congress.

CONCLUSION

For the above reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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MARCH 2013

APPENDIX 1: Excerpts from the Republican River Compact

"Article VI

"The right of any person, entity, or lower State to construct, or participate in the future construction and use of any storage reservoir or diversion works in an upper state for the purpose of regulating water herein allocated for beneficial consumptive use in such lower state, shall never be denied by an upper state; provided, that such right is subject to the rights of the upper state.

"Article VII

"Any person, entity, or lower state shall have the right to acquire necessary property right in an upper state by purchase, or through the exercise of the power of eminent domain, for the construction, operation and maintenance of storage reservoirs, and of appurtenant works, canals and conduits, required for the enjoyment of the privileges granted by Article VI; provided, however, that the grantees of such rights shall pay to the political subdivisions of the state in which such works are located, each and every year during which such rights are enjoyed for such purpose, a sum of money equivalent to the average annual amount of taxes assessed against the lands and improvements during the ten years preceding the use of such lands, in reimbursement for the loss of taxes to said political subdivisions of the state.

APPENDIX 2: Excerpts from the Rio Grande Compact

"Article IX

Colorado agrees with New Mexico that in event the United States or the state of New Mexico decides to construct the necessary works for diverting the waters of the San Juan river, or any of its tributaries, into the Rio Grande, Colorado hereby consents to the construction of said works and the diversion of waters from the San Juan river, or the tributaries thereof, into the Rio Grande in New Mexico, provided the present and prospective uses of water in Colorado by other diversions from the San Juan River, or it tributaries are protected.

APPENDIX 3: Excerpts from the Upper Colorado Compact

"Article IX

"(a) No state shall deny the right of the United States of America and, subject to the conditions hereinafter contained, no state shall deny the right of another signatory state, any person, or entity of any signatory state to acquire right to the use of water, or to construct or participate in the construction and use of diversion works and storage reservoirs with appurtenant works, canals and conduits in one state for the purpose of diverting, conveying, storing, regulating and releasing water to satisfy the provisions of the Colorado river compact relating to the obligation of the states of the upper division to make deliveries of water at Lee ferry, or for the purpose of diverting, conveying, storing or regulating water in an upper signatory state for consumptive use in a lower signatory state, when such use is within the apportionment to such lower state made by this compact. Such rights shall be subject to the rights of water users, in a state in which such reservoir or works are located, to receive and use water, the use of which is within the apportionment to such state by this compact.

"(b) Any signatory state, any person or any entity of any signatory state shall have the right to acquire such property rights as are necessary to the use of the water in conformity with this compact in any other signatory state by donation, purchase or through the exercise of the power of eminent domain. Any signatory state, upon the written request of the

governor of any other signatory state, for the benefit of whose water users property is to be acquired in the state to which such written request is made, shall proceed expeditiously to acquire the desired property either by purchase at a price satisfactory to the requesting state, or, if such purchase cannot be made, then through the exercise of its power of eminent domain and shall convey such property to the requesting state or such entity as may be designated by the requesting state; provided, that all costs of acquisition and expenses of every kind and nature whatsoever incurred in obtaining the requested property shall be paid by the requesting state at the time and in the manner prescribed by the state requested to acquire the property.

"(c) Should any facility be constructed in a signatory state by and for the benefit of another signatory state or states or the water users thereof, as above provided, the construction, repair, replacement, maintenance and operation of such facility shall be subject to the laws of the state in which the facility is located, except that, in the case of a reservoir constructed in one state for the benefit of another state or states, the water administration officials of the state in which the facility is located shall permit the storage and release of any water which, as determined by findings of the commission, falls within the apportionment of the state or states for whose benefit the facility is constructed. In the case of a regulating reservoir for the joint benefit of all states in making Lee ferry deliveries, the water administration officials

of the state in which the facility is located, in permitting the storage and release of water, shall comply with the findings and orders of the Commission.

"(d) In the event property is acquired by a signatory state in another signatory state for the use and benefit off the former, the users of water made available by such facilities, as a condition precedent to the use thereof, shall pay to the political subdivisions of the state in which such works are located, each and every year during which such rights are enjoyed for such purposes, a sum of money equivalent to the average annual amount of taxes levied and assessed against the land and improvements thereon during the ten years preceding the acquisition of such land. Said payments shall be in full reimbursement for the loss of taxes in such political subdivisions of the state, and in lieu of any and all taxes on said property, improvements and rights. The signatory states recommend to the President and the congress that, in the event that United States of America shall acquire property in one of the signatory states for the benefit of another signatory state, or its water users, provision be made for like payment in reimbursement of loss of taxes.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
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No. 11-889

In the Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,
Petitioner,

v.

RUDOLF JOHN HERRMANN, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Petitioner Tarrant Regional Water District, a political subdivision of the State of Texas, is responsible for supplying water to nearly two million people in North Central Texas, one of the fastest growing and most productive regions of the country. Tarrant has identified certain water within Oklahoma as the most practical source for supplying the region's immediate and long-term needs. *See* Pet'r Br. at 15.

Critically, Texas has "equal rights to . . . use" that water under Section 5.05(b)(1) of the Red River Compact, an interstate compact approved by Congress. 1JA at 25. By upholding Oklahoma's protectionist water-permitting laws, however, the Tenth Circuit thwarted Tarrant's ability to obtain any water from within the Oklahoma portion of the Red River Basin. Texas has a substantial interest in ensuring that its residents have access to their share of that water.

SUMMARY OF ARGUMENT

The Red River Compact grants Texas a right to use a fixed percentage of water from within Reach II, Subbasin 5 of the Red River Basin, a geographically defined area that traverses parts of Oklahoma, Texas, and Arkansas. Nonetheless, the Tenth Circuit concluded that Oklahoma may apply its discriminatory laws to prevent Texas users like Tarrant from acquiring any portion of Texas's share of Subbasin 5 water from within the physical boundaries of Oklahoma—even if that water cannot be accessed from inside Texas's border.

Relying upon a presumption against the implied preemption of state laws, the Tenth Circuit determined

that Section 5.05(b)(1) of the Compact could be squared with Oklahoma's challenged statutes by narrowly construing each Signatory State's "equal rights to the use of" Subbasin 5 water to include only water from within each State's own physical boundaries. The Tenth Circuit's use of the presumption to interpret the Compact was misplaced and prejudicial. The rationale underlying the presumption against implied preemption—that Congress does not lightly interfere with the States' ability to enact and enforce their own laws—is inapposite here, where the federal law at issue is an interstate compact that was negotiated by several States themselves. Applying the presumption was particularly inappropriate because the Compact sets forth the Signatory States' specific intent to preempt any state laws that conflict with water apportionments made in the agreement.

Under a proper "plain terms" analysis of Section 5.05(b)(1) of the Compact, and especially when compared to other sections of the agreement, it is clear that Texas (and each Signatory State) is entitled to use up to 25% of Subbasin 5 water without reference to state borders. The Compact, therefore, provides Texas with the right to obtain its share of Subbasin 5 water from that portion of the subbasin that sits within the physical boundaries of Oklahoma. At a minimum, Oklahoma cannot prevent Texas users from accessing the State's share of Subbasin 5 water from within Oklahoma if that water cannot be obtained from inside the Texas portion of the subbasin, which lies downstream from Oklahoma.

Instead of providing access to Texas's share of Subbasin 5 water, however, Oklahoma enacted a series of laws that effectively prevent out-of-state users like Tarrant from appropriating any water from within Oklahoma. The Court should reverse the Tenth Circuit's judgment to ensure that Oklahoma may not escape its compact obligations—and deprive Texas users of the water they are entitled to use—under the cover of Oklahoma's statutes.

ARGUMENT

TEXAS'S "EQUAL RIGHT[] TO THE USE OF" A FIXED PERCENTAGE OF WATER LOCATED WITHIN REACH II, SUBBASIN 5 OF THE RED RIVER COMPACT PREEMPTS OKLAHOMA'S PROTECTIONIST WATER LAWS.

For nearly a century, the States have negotiated compacts to govern the use and control of interstate waters in the arid West. With Congress's approval, such compacts become federal law, superseding inconsistent state laws, *Del. River Joint Toll Bridge Comm'n v. Colburn*, 310 U.S. 419, 433-34 (1940), and other preexisting state-granted water rights, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938).

Compacts, therefore, enable States to plan for future demand with certainty that water will be available when the need arises—irrespective of competing claims based upon priority or other interests. *See Montana v. Wyoming*, 131 S. Ct. 1765, 1779 (2011) (Compacts may be used "to guarantee [States] a set quantity of water . . ."); *see also Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 n.20 (1982) ("[T]his Court has encouraged

States to resolve their water disputes through interstate compacts rather than by equitable apportionment adjudication.") (citation omitted).[1]

The Red River Compact is one such compact joined by the States of Arkansas, Louisiana, Oklahoma, and Texas. One of its "principal purposes" is "[t]o provide a basis for state . . . planning and action by ascertaining and identifying each state's share in the interstate water of the Red River Basin and the apportionment thereof." 1JA at 9-10 (Compact, § 1.01(e)). Whether those apportionments conflict with—and therefore preempt—Oklahoma's challenged water-permitting laws requires interpretation of the Compact. *Cf. Hinderlider*, 304 U.S. at 110-11 (Court may determine the effect of an interstate compact even where the contracting States are not parties to the suit).

A. An Interstate Compact Must Be Read According to Its Plain Terms—Not with a Presumption Against Preemption of Conflicting State Laws.

1. While an interstate compact approved by Congress is federal law, *Cuyler v. Adams*, 449 U.S. 433, 440 (1981), it is also a type of contract that is construed according to ordinary principles of contract law, *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). The primary goal of contract interpretation is to effectuate the

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1. Despite best intentions, the mere existence of an interstate water compact does not foreclose the possibility that the Court may be required to interpret its language to resolve a dispute that arises between the compacting States. *Cf. Texas v. New Mexico*, 462 U.S. 554, 568 (1983).

contracting parties' intent. *See Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 370-71 (1984). That is accomplished by adhering to and enforcing the "plain terms" of the contract. *Montana*, 131 S. Ct. at 1779; *see also New Jersey v. Delaware*, 552 U.S. 597, 615-16 (2008) ("Interstate compacts, like treaties, are presumed to be 'the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties.'") (quoting *Rocca v. Thompson*, 223 U.S. 317, 332 (1912)).

Faced with Tarrant's Supremacy Clause challenge to Oklahoma's water-permitting statutes, the Tenth Circuit disregarded these cardinal tools of compact construction and instead interpreted the Red River Compact under the distorting effect of a "presumption against implied conflict preemption." *See* Pet. App. at 34-35, 40-41, 43.

2. The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Consistent with the plain command of the Supremacy Clause, state laws that conflict with federal law are "'without effect.'" *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

State laws may be preempted by force of the Supremacy Clause through express language in a congressional statute, by implication arising from the

breadth of federal enactments occupying a particular legislative field, or by implication based upon an actual conflict with federal law. *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1265-66 (2012) (citations omitted). Conflict preemption occurs in cases where compliance with both federal and state law is a physical impossibility and in those instances in which state law stands as an obstacle to the accomplishment of federal objectives. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (citations omitted).

Although the Court has employed a presumption against implied conflict preemption, under which federal law is construed to avoid a conflict with state law to the extent possible, *see, e.g., Wyeth v. Levine*, 555 U.S. 555, 565 (2009), the Court also has held that the presumption should not be used to interpret the "substantive (as opposed to pre-emptive) *meaning*" of federal law when there is no doubt that the law is intended to preempt state laws, *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 743-44 (1996) (the "meaning" of a federal statute is a separate question from "whether" it is preemptive) (emphasis in original). *See also Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 555-56 (2009) (Thomas, J., concurring in part and dissenting in part) (The act of statutory construction "may clarify the pre-emptive scope of enacted federal law . . . .").

More recently, in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011), the Court expressed uncertainty regarding the continuing vitality of the presumption. *Compare id.* at 2580 (Thomas, J., plurality op.) (Courts "should not strain to find ways to reconcile federal law with seemingly conflicting state law," but should instead

"look no further than the ordinary meaning of federal law" without "distort[ing] federal law to accommodate conflicting state law.") (internal quotation marks omitted), *with id.* at 2583 (Sotomayor, J. dissenting) ("[A] plurality of the Court tosses aside our repeated admonition that courts should hesitate to conclude that Congress intended to pre-empt state laws governing health and safety.").

3. Despite any lingering uncertainty over the proper tool of construction for interpreting federal statutes and regulations in a typical conflict-preemption case, the presumption against preemption should not have been applied here, where the federal law at issue is an interstate compact.

The Court utilizes the presumption out of "respect for the States as 'independent sovereigns in our federal system,'" under the assumption that Congress does not "'cavalierly'" act to eliminate the States' authority to enact and enforce their own laws. *Wyeth*, 555 U.S. at 565 n.3 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Accordingly, it makes little sense to apply the presumption when interpreting an interstate compact that was negotiated, drafted, and executed by a group of States—at least when the Court is tasked with determining whether the compact conflicts with one of the party State's own laws.

Employing the presumption effectively favors one State's interpretation of the compact over the objective meaning of its terms, and in turn, will often deprive non-breaching States of bargained-for compact benefits under the guise of respecting State sovereignty. Not surprisingly, the Court long ago recognized that States

may not unilaterally determine the effect of their compact obligations by force of their own laws:

> It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State.

West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28 (1951); *see also Hinderlider*, 304 U.S. at 106 ("Whether the apportionment of the water of an interstate stream be made by compact . . . with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact."); *Kentucky v. Indiana*, 281 U.S. 163, 176-77 (1930) (States cannot determine their rights under an interstate compact "inter sese," but instead, the Court "must pass upon every question essential to such a determination, although local legislation . . . may be involved.").

At bottom, the Tenth Circuit was able to salvage Oklahoma's challenged water statutes only by erroneously subverting the other Signatory States' rights under the Red River Compact.

4. What is more, the Tenth Circuit overlooked the fact that the Signatory States had anticipated the potential for conflict between the Compact and state laws, and explicitly proclaimed in two places that the

Compact must prevail in all such instances. First, Section 2.01 of the Compact states:

> Each Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state [and] may freely administer water rights and uses in accordance with the laws of that state, *but such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact.*

1JA at 10 (emphasis added). Section 2.10(a) then states:

> Nothing in this Compact shall be deemed to: [i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, *not inconsistent with its obligations under this Compact.*

Id. at 12 (emphasis added).

Although the Tenth Circuit cited portions of these provisions to support its conclusion that Congress and the Signatory States intended to preserve the States' ability to regulate the usage and control of water within their boundaries, *see* Pet. App. at 33, 35, the court omitted and failed to account for the overriding effect of the italicized language. The cited provisions make unmistakably clear that, although the Signatory States are generally permitted to administer water rights within their borders, they may not legislate away their Compact commitments. *Cf. Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869-72 (2000) (a "saving" clause

preserving the operation of state law does not bar or affect the ordinary working of conflict preemption principles).

Simply put, there is no basis for employing a presumption against implied preemption when the Signatory States specifically provided that the Compact must prevail in the event of any conflict with state law. *See Medtronic,* 518 U.S. at 485 (Preemptive "purpose . . . is the ultimate touchstone in every preemption case.") (internal quotation marks omitted). Instead of endeavoring to reconcile the Compact with Oklahoma law, the Tenth Circuit should have aimed to give effect to the plain meaning of the Compact's text. *See Smiley*, 517 U.S. at 744 ("What *is* at issue here is simply the meaning of a provision that does not . . . deal with preemption [itself], and hence does not bring into play the considerations" warranting usage of a presumption against preemption.) (emphasis in original).

B. Section 5.05(b)(1)'s "Equal Rights" Provision Supercedes Oklahoma's Water-Permitting Scheme.

1. Oklahoma's challenged water-permitting statutes cannot be reconciled with the plain command of Section 5.05(b)(1) of the Compact. That section declares that the Signatory States "shall have *equal rights to the use of* runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more," further providing that "no state is *entitled* to more than 25 percent of the

water in excess of 3,000 cubic feet per second." 1JA at 25 (emphases added).[2]

Section 5.05(b)(1) does not limit Signatory States to water usage they can obtain from within their own borders. Neither does it limit States to water that trickles down from upstream States from within the subbasin. Instead, Section 5.05(b)(1) entitles each Signatory State to use up to 25% of water that originates in or flows into an interstate area. No other subbasin established in the Compact allocates water in the same fashion.

To begin with, Subbasin 5 is not defined by state lines: it traverses parts of Oklahoma, Texas, and Arkansas. This contrasts with other subbasins that are defined by State boundaries. *See* 1JA at 18-19 (Compact § 4.02(a)); *id.* at 19 (Compact § 4.03(a)); *id.* at 22 (Compact § 5.01(a)); *id.* at 23 (Compact § 5.02(a)); *id.* at 38 (Compact § 8.01). But unlike several subbasins that do cross state lines, Section 5.05(b)(1) does *not* limit the Signatory States' "equal rights to the use of" water in Subbasin 5 to the usage they can obtain from within their respective borders. *Compare id.* at 25 (Compact § 5.05(b)(1)), *with id.* at 23-24 (Compact § 5.03(b)) (Oklahoma and Arkansas "shall have free and unrestricted use of the water of this subbasin *within their respective states* . . . .") (emphasis added), *id.* at 33 (Compact § 6.03(b)) ("Texas and Louisiana *within their respective boundaries* shall each have the unrestricted

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2. The Red River meets these minimum flow conditions over 95% of the time. 1JA, at 30.

use of the water of this subbasin . . . .") (emphasis added).

Moreover, Section 5.05(b)(1) does not limit downstream States to a percentage of "flow into" their borders from upstream States in Subbasin 5, which, again, contrasts with the Compact's mode for allocating water in other interstate subbasins. *Compare id.* at 25 (Compact § 5.05(b)(1)), *with id.* at 36-37 (Compact § 7.02(b)) ("The State of Arkansas shall have free and unrestricted use of the water of this reach subject to the limitation that [it] shall allow a quantity of water equal to forty (40) percent of the weekly runoff . . . to flow into Louisiana.").

Instead, Section 5.05(b)(1) provides all four Signatory States with "equal rights to the use of runoff originating in . . . and undesignated water flowing into" any part of Subbasin 5 without reference to state lines. The differing terminology used throughout the Compact is presumptively meaningful. *See New Jersey*, 552 U.S. at 615-16; *cf. Miller v. Robertson*, 266 U.S. 243, 251 (1924) (intention of parties to an agreement should be gathered from the whole instrument); NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES & STATUTORY CONSTRUCTION § 46:6 (7th ed. 2007) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.").

2. Under its plain terms, and particularly when compared to other sections of the Compact, Section 5.05(b)(1) provides each Signatory State with the right to use up to 25% of the water from anywhere within Subbasin 5. Consequently, Texas has the right to

obtain Subbasin 5 water from within the Oklahoma portion of the subbasin, provided that Texas does not appropriate more than its 25% allotment.[3] Indeed, Oklahoma cannot use more than its own 25% share of Subbasin 5 water before the water crosses out of the State. *Cf.* 1JA at 30 (Interpretive Comment) ("If the states have competing uses and the amount of water available in excess of 3000 cfs cannot satisfy all such uses, each state will honor the other's right to 25% of the excess flow."). Requiring Oklahoma to allow Texas users to access Texas's share of Subbasin 5 water from within Oklahoma will not upend other compact arrangements across the country because, as Oklahoma recognizes, the specific language used in Section 5.05(b)(1) does not appear in any other compact in the United States. Br. Opp'n at 17; Suppl. Br. at 9.

At a minimum, Oklahoma cannot prevent Texas users from accessing Texas's share of Subbasin 5 water from within Oklahoma if such water is unavailable inside Texas's own borders. To that end, Tarrant

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3. The Court need not determine whether or how much water Tarrant is entitled to appropriate from within the Oklahoma portion of Reach II, Subbasin 5 at this stage of the lawsuit. The question presented is whether Oklahoma may apply its laws to prevent Texas users like Tarrant from accessing Subbasin 5 water in the face of Texas's rights under Section 5.05(b)(1) of the Compact. If the Court concludes that the Compact preempts the challenged laws at issue, the State of Texas will have authority to administer rights to its share of Subbasin 5 water. 1JA at 10 (Compact § 2.01) ("Each Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state. Each state may freely administer water rights and uses in accordance with the laws of that state . . . .").

maintains that the Texas portion of Subbasin 5 does not yield sufficient quantities of water to support Texas's allotment. Pet'r Br. at 9 n.5. But in endeavoring to salvage Oklahoma's challenged laws, the courts below forbade Tarrant from adducing evidence to make that showing, deeming it irrelevant. *See* Pet. App. at 44 n.3 ("The only fact we take the parties to dispute—whether Texas can receive a 25 percent share of the excess water in the Texas part of Reach II, Subbasin 5—is not necessary to our disposition of this issue because we hold that § 5.05(b)(1) does not allocate water located in Oklahoma to Texas regardless of what amount of water Tarrant and other Texas users can appropriate in Texas."). Texas plainly loses the benefits of the bargain it made with Oklahoma (among others) if Texans are both physically unable to access the State's share of Subbasin 5 water from within Texas, and legally prevented from obtaining it in Oklahoma on account of their residency.

3. By establishing a series of legal obstacles that restrict out-of-state water users like Tarrant from obtaining water, Oklahoma's challenged laws conflict with and burden Texas's rights under Section 5.05(b)(1) of the Compact. While Oklahoma is entitled to regulate and administer water rights within its boundaries, it may not prevent Texas users from accessing, with Texas's regulatory approval, Texas's rightful share of Subbasin 5 water from within Oklahoma. 1JA at 10, 12 (Compact §§ 2.01, 2.10(a)).

Although the Tenth Circuit correctly concluded that Section 5.05, as a whole, is designed to "ensure that an equitable share of water from the subbasin reaches the

states downstream from Oklahoma and Texas," Pet. App. at 36, the court overlooked the remainder of the rights established by the section in its effort to accommodate the challenged Oklahoma laws. Sections 5.05(b)(2)-(3) do require the upstream States to allow certain amounts of water to flow into Louisiana under low-flow conditions. But nothing changes the fact that the Signatory States also are entitled to enjoy their equal share of Subbasin 5 water under ordinary flow conditions. As Tarrant points out, the Compact would not have established an interstate subbasin providing the Signatory States with "equal rights to the use of" water therein, 1JA at 25, had the drafters intended only to ensure downstream flows to Louisiana, *see* Pet'r Br. at 36-37.

4. Because Oklahoma's water-permitting statutes cannot be reconciled with Section 5.05(b)(1) of the Compact, they must "give way" to the Compact as a matter of law. *PLIVA*, 131 S. Ct. at 2577. The Court should reverse the Tenth Circuit's judgment and hold that Oklahoma's challenged laws cannot be applied to restrict Tarrant from obtaining Texas's share of Subbasin 5 water from within Oklahoma.

CONCLUSION

The Court should reverse the judgment of the Tenth Circuit and remand for further proceedings.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,

Petitioner,

v.

RUDOLF JOHN HERRMANN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE TEXAS WATER CONSERVATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF TEXAS WATER CONSERVATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER'S BRIEF ON THE MERITS

INTEREST OF AMICUS CURIAE TEXAS WATER CONSERVATION ASSOCIATION[1]

The Texas Water Conservation Association ("TWCA") is a statewide association of governmental and private entities in Texas that are active and vitally interested in the water resource field. TWCA's membership consists of approximately 400 members, including municipalities, river authorities, and water districts, as well as firms and individuals in the engineering, legal, hydrology, and geology fields, and other individuals and businesses active in various phases of water supply, planning, and development.

TWCA's members are responsible for providing public water supplies to most Texans. The broadly stated purpose of TWCA is to foster the development, conservation, protection, and utilization of the State's water resources for beneficial use by its citizens. TWCA is also a forum for developing and recommending water policy initiatives, and provides a voice for Texas "water interests" on state and federal issues.

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[1] The parties have consented to the filing of this amicus brief pursuant to Rule 37.3. This brief was not authored in whole or in part by counsel for any party, and no party, or parties' counsel, has made any monetary contribution intended to fund the preparation or submission of this brief.

TWCA supports Petitioner's Merits Brief and Petitioner's request that the Court reverse the decision of the Tenth Circuit, because that decision, if affirmed, would undermine the integrity and efficacy of Texas' state and regional water planning process. More specifically, that decision, if affirmed, would prevent TWCA members from pursuing water management strategies that have been recommended as a result of Texas' state and regional water planning process and which involve obtaining water from Oklahoma. Moreover, that decision, if affirmed, would prevent TWCA members and regional planning groups that are not currently considering water management strategies that involve obtaining water from Oklahoma from doing so.

The purpose of this amicus brief is to describe the history of state and regional water planning in Texas, describe the current water planning process, note the recommended water management strategies which involve obtaining water from Oklahoma, and explain how the integrity and efficacy of Texas' water planning process will be undermined if the decision of the Tenth Circuit in this case is affirmed.

SUMMARY OF ARGUMENT

In large part because of its susceptibility to drought, Texas has a long history of water planning. In recent times, the Texas Legislature has mandated a water planning process "from the ground up" which

begins at the regional level and culminates in comprehensive regional and state water plans that are fully updated every five years. This process has, since as early as 2001, resulted in major recommended water management strategies and projects that involve obtaining water in Oklahoma for use in what is known as water planning Region C (which includes the Dallas/Fort Worth Metroplex) in order to fulfill critical water needs in that area.

The water planning process that has resulted in these recommended strategies took into account the allocation of water to which Texas is entitled pursuant to the Red River Compact ("Compact"). In fact, one of the major and express purposes of the Compact is to allow States to plan. Texas has done so and is far ahead of many other states in doing so – again, largely as a result of its susceptibility to drought.

At issue in this case is the interpretation of critical Compact language involving the allocation of water in Reach II, Subbasin 5. Texas' water planning process relied on the Compact's plain language and the only sensible reading of that language in adopting recommended strategies involving obtaining water from Oklahoma. The Tenth Circuit's interpretation of that critical language, and interpretations urged by Respondents, if adopted, would mean that those recommended strategies would no longer be possible. Accordingly, those recommended strategies and projects and the integrity and efficacy of the state and regional water planning process, depend on the Court's reversal of the Tenth Circuit's decision and a

rejection of the interpretation of the Compact urged by Respondents.

ARGUMENT

I. Water Planning in Texas Began Early, and Developed and Increased as a Result of the 1950s Drought

Droughts have long plagued Texas – since well before the first Spanish and Anglo settlers began arriving in the 1700s.[2] Against that backdrop, and as recounted below, Texas has long recognized and planned for the water supply needs of its citizens.

A. Early Water Management and Development Efforts by the Texas Legislature

The Texas Legislature began assigning responsibility for the management and development of water resources to various governmental entities created under state law starting in the early 20th century.[3] In 1904, partially as a result of devastating droughts and floods, a constitutional amendment was adopted authorizing the first public development of water resources. The Legislature authorized the creation of

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[2] Water for Texas 2012: State Water Plan, Texas Water Development Board ("2012 SWP") at 14. The 2012 Texas State Water Plan is available at http://www.twdb.state.tx.us/publications/state_water_plan/2012/2012_SWP.pdf

[3] 2012 SWP at 15.

drainage districts in 1905, the Texas Board of Water Engineers in 1913, conservation and reclamation districts including river authorities in 1917, freshwater supply districts in 1919, and water control and improvement districts in 1925.[4]

In 1949, then-Senator Lyndon Johnson wrote to the U.S. Secretary of the Interior, requesting that the federal government help guide Texas in achieving "a comprehensive water program that will take into account the need of the people of my State."[5] Four years later, a U.S. Bureau of Reclamation's report – *Water Supply and the Texas Economy: An Appraisal of the Texas Water Problem* – divided the state into four planning regions and evaluated existing and projected municipal and industrial water requirements up to the year 2000. The appraisal identified "problem areas," presented water supply plans as potential solutions, made a number of observations on state and federal policy, and recommended that Texas consider forming a permanent water planning and policy agency.[6]

B. The 1950s Drought

From 1950-56, Texas experienced the worst statewide drought in its recorded history. By the end

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[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid.*

of 1956, all but one of Texas' 254 counties were classified as disaster areas. This drought was the driest seven-year period and is still considered Texas' "drought of record" upon which most water supply planning in the state is based. The 1950s drought was unique in that a majority of Texans felt the impacts of a reduced water supply. Small and large cities alike faced dire situations. The 1950s drought cost the state hundreds of millions of dollars.[7]

C. State Water Planning from 1957-1997

The Texas Legislature established the Texas Water Resources Committee in 1953 to survey the state's water problems.[8] As a result of the committee's recommendations, the Legislature passed a resolution authorizing $200 million in state bonds to help construct water conservation and supply projects and created the Texas Water Development Board ("TWDB") to administer the funds from the bond sale.[9] Then, during a special session, the Legislature passed the Water Planning Act of 1957, creating the Texas Water Resources Planning Division of the Board of Water Engineers, which was assigned the responsibility of water resources planning on a statewide basis.[10] Texas voters subsequently approved

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[7] *Id.* at 16.

[8] *Ibid.*

[9] *Ibid.*

[10] *Id.* at 16-17.

a constitutional amendment authorizing TWDB to administer a $200 million water development fund to help communities develop water supplies.[11]

In 1960, the Texas Governor requested that the Board of Water Engineers prepare a planning report with projects to meet the projected municipal and industrial water requirements of the state by 1980.[12] Work quickly began on statewide studies to develop the first state water plan. The first plan – entitled *A Plan for Meeting the 1980 Water Requirements of Texas* – was published in 1961. The plan described historical and present uses of surface and groundwater by municipalities, industries, and irrigation; summarized the development of reservoirs; estimated the 1980 municipal and industrial requirements of each area of the state; provided a plan for how to meet those requirements by river basin; and discussed how the plan could be implemented.[13]

Later plans were developed by the State and adopted in 1968, 1984, 1990, 1992, and 1997. All of the plans have recognized the growth of Texas' population and the need to develop future water supplies. Earlier plans placed more reliance on the federal government, while later plans have increasingly

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[11] *Id.* at 17

[12] *Ibid.*

[13] *Ibid.*

emphasized the importance of conservation and natural resource protection.[14]

The 1984 State Water Plan was the first to address water quality, water conservation and water use efficiency, and environmental water needs in detail. While previous plans were organized by river basin, the 1990 State Water Plan projected water demands, supplies, and facility needs for eight regions in the state. The 1997 State Water Plan – developed by TWDB through a consensus process with the Texas Parks and Wildlife Department and the Texas Commission on Environmental Quality – divided the state into 16 planning regions.[15]

II. The Current System: Regional and State Water Planning (1997-present)

A. Planning "From the Ground Up"

In the mid-1990s, Texas suffered an intense 10-month drought. Reservoirs and aquifer levels declined sharply and farmers suffered widespread crop failure, with estimated economic losses in the billions of dollars. Some cities had to ration water for several months and others ran out of water entirely.[16] The drought of 1996 lasted long enough to remind Texans of the importance of water planning.

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[14] *Ibid.*

[15] *Ibid.*

[16] *Id.* at 19.

When the Legislature met in 1997, the Lieutenant Governor declared that the primary issue would be water. After lengthy debate, Senate Bill 1 was passed to improve the development and management of the water resources in the State.[17] Among provisions relating to water supplies, financial assistance, water data collection and dissemination, and other water management issues, the bill established the regional water planning process: a new framework that directed that water planning be conducted "from the ground up."[18]

Senate Bill 1 outlined a new process where local and regional stakeholders were tasked with developing consensus-based regional plans for how to meet water needs during times of drought. TWDB would then develop a comprehensive state water plan – based on the regional water plans – every five years.[19]

As directed by the Legislature, TWDB designated 16 regional water planning areas, taking into consideration river basin and aquifer delineations, water utility development patterns, socioeconomic characteristics, existing regional water planning areas, state political subdivision boundaries, public comments, and other factors. Although TWDB is required to review and update the planning area boundaries at

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[17] *Ibid.*

[18] *Ibid.*

[19] *Ibid.*

least once every five years, no changes have been made to date.[20]

Each regional water planning area has its own planning group which is responsible for developing a regional water plan every five years. Regional water planning groups are required to have at least eleven interests represented, including the public, counties, municipalities, industries, agriculture, environment, small businesses, electric-generating utilities, river authorities, water districts, and water utilities. Planning groups must have at least one representative from each interest, and can designate representatives for other interests that are important to the planning area. Planning groups also have non-voting members from federal, state, and local agencies and have members that serve as liaisons with planning groups in adjacent areas.[21]

The regional water planning process consists of ten tasks:

- describing the regional water planning area;
- quantifying current and projected population and water demand over a 50-year planning horizon;
- evaluating and quantifying current water supplies;

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[20] *Ibid.*

[21] *Ibid.*

- identifying surpluses and needs;
- evaluating and recommending water management strategies to meet those needs;
- evaluating impacts of water management strategies on water quality;
- describing how the regional plan is consistent with long-term protection of the state's water, agricultural, and natural resources;
- recommending regulatory, administrative, and legislative changes;
- describing how sponsors of water management strategies will finance projects; and
- adopting the regional plan.[22]

B. Evaluation and Recommendation of Water Management Strategies

After identifying surpluses and needs for water in their regions, regional water planning groups evaluate and recommend water management strategies to meet the needs for water during severe drought. If existing supplies do not meet future

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[22] *Id.* at 20.

demand, they recommend specific water management strategies to meet water supply needs.[23]

A water management strategy is a plan or a specific project to meet a need for additional water by a discrete user group, which can mean increasing the total water supply or maximizing an existing supply. Strategies can include development of new groundwater or surface water supplies; conservation; reuse; demand management; expansion of the use of existing supplies such as improved operations or conveying water from one location to another; or less conventional methods like weather modification, brush control, and desalination. Factors used in the water management strategy assessment process include:

- the quantity of water the strategy could produce;
- capital and annual costs;
- potential impacts the strategy could have on water quality, water supply, and agricultural and natural resources; and
- reliability of the strategy during time of drought.[24]

The water management strategy evaluation process also considers other factors applicable to individual regions including difficulty of implementation,

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[23] *Id.* at 187.

[24] *Id.* at 188.

regulatory issues, regional or local political issues, impacts to recreation, and socioeconomic benefits or impacts. Upon conclusion of a thorough evaluation process, planning groups recommend a combination of water management strategies to meet specific needs in their regions in the event of a repeat of the drought of record.[25]

C. Development of the State Water Plan

After planning groups adopt their regional water plans, they are sent to TWDB for approval. TWDB then begins development of the state water plan. The state water plan incorporates information from the regional water plans, but it is not merely the sum of the regional plans. The state water plan serves as a guide to state water policy; it also explains planning methodology, presents data for the state as a whole, identifies statewide trends, and provides recommendations to the Legislature. Prior to adoption of the final state water plan, TWDB releases a draft for public comment, publishes its intent to adopt the state water plan in the Texas Register, notifies the regional water planning groups, and holds a public hearing in Austin.[26]

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[25] *Id.* at 189

[26] *Id.* at 20.

D. The 2012 Texas State Water Plan

The 2012 State Water Plan is the third plan developed through the regional water planning process.

In response to issues identified in the 2007 State Water Plan, the Legislature made several policy changes that impacted water planning. In 2005, the Texas Legislature passed Senate Bill 3, which created a process to address environmental flows and designated unique reservoir sites and sites of unique ecological value. The Legislature also provided appropriations to allow $1.2 billion of funding to implement water management strategies recommended in the 2006 regional water plans and the 2007 State Water Plan. Priority was given to entities with the earliest recommended implementation date in the state and regional water plans and which have demonstrated significant water conservation savings or would achieve significant water conservation by implementing a proposed project.[27]

E. Texas is Well Ahead of the Curve in Water Planning

As the above discussion demonstrates. Texas is well ahead of most other states in the area of state and regional water planning.

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[27] *Id.* at 21.

III. Obtaining Water from Oklahoma is a Recommended Strategy in the 2011 Region C Water Plan and the 2012 State Water Plan

A. Description of Regional Water Planning Area C

Regional Water Planning Area C ("Region C") covers all or part of 16 counties in North Central Texas.[28] The population of Region C has grown from 987,925 in 1930 to 6,347,326 in 2008 and the area is still growing rapidly.[29] As of 2008, Region C included 26 percent of Texas' total population.[30]

The two most populous counties in Region C, Dallas and Tarrant, have 65 percent of the region's population.[31] Region C includes most of the Dallas and Fort Worth-Arlington area. Water use in Region C has increased in recent years, primarily in response to increasing population and municipal use.[32]

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[28] 2011 Region C Water Plan, Freese and Nichols, *et al.* (October 2010) ("2011 Region C Plan"), p. I.1. Region C includes all of Cooke, Grayson, Fannin, Jack, Wise, Denton, Collin, Parker, Tarrant, Dallas, Rockwall, Kaufman, Ellis, Navarro, and Freestone Counties and the part of Henderson County that is in the Trinity Basin. The 2011 Region C Plan is available at: http://www.twdb.state.tx.us/waterplanning/rwp/plans/2011/C/Region_C_2011_RWPV1.pdf

[29] 2011 Region C Plan, p. 1.1.

[30] *Ibid.*

[31] *Ibid.*

[32] *Id.*, p. 1.13.

Municipal use is by far the largest water use category in Region C, with significant manufacturing as well.[33]

B. Recommended Major Water Management Strategies for Region C Include Obtaining Water from Oklahoma

The 2011 Region C Water Plan lists and describes several recommended major water management strategies to ensure a water supply for Region C.[34] Those strategies include obtaining water from Oklahoma.[35] Texas public entities within Region C that would receive and use water from Oklahoma are: Petitioner Tarrant Regional Water District ("Tarrant"); North Texas Municipal Water District ("NTMWD"); City of Irving; and Upper Trinity Regional Water District ("UTRWD").[36] In addition, obtaining water from Oklahoma beginning in 2060, has been identified as an *alternative* (as opposed to a *recommended*) water management strategy for Dallas Water Utilities ("DWU").[37] Tarrant, NTMWD, and UTRWD are wholesale water providers. City of Irving and DWU are retail water providers.

The regional water planning group for Region C has estimated that water from Oklahoma would cost

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[33] *Ibid.*

[34] *Id.*, p. ES.10

[35] *Ibid.*

[36] *Ibid.*

[37] *Id.*, pp. 4E.4, 4E.9.

about $2.09 per thousand gallons and would have relatively low environmental impacts because it involves the use of existing sources.[38] Alternatives would be substantially more expensive.[39] Accordingly, obtaining water from Oklahoma is an important if not critical component of obtaining and ensuring an adequate water supply for Region C.

C. The 2012 State Water Plan Includes Two Recommended Projects Involving Water from Oklahoma

Texas' 2012 State Water Plan likewise identifies two recommended projects involving water from Oklahoma. One project would bring water from Oklahoma to the City of Irving beginning in the year 2030 at an estimated capital cost of approximately $195 million. The other would bring water from Oklahoma to NTMWD, Tarrant, and UTRWD beginning in the year 2060, at an estimated capital cost of approximately $756 million.[40]

In addition, like the 2011 Region C Plan, Texas' 2012 State Water Plan identifies the alternative water management strategy of bringing water from Oklahoma to DWU beginning in year 2060, at an

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[38] *Id.*, p. 4D.14.

[39] 2012 SWP at 253 and 254; *see also* Brief for Petitioner at 15.

[40] *Id.* at 19, 253.

estimated capital cost of approximately $345 million.[41]

IV. Recommended Strategies to Obtain Water from Oklahoma Pre-date the Current State and Regional Water Plans

Obtaining water from Oklahoma was also identified as recommended and alternative water management strategies in the 2001 and 2006 Region C water plans.[42]

V. The Tenth Circuit's Decision, if Affirmed, Would Undermine the Integrity and Efficacy of Texas' Water Planning Process

A. The Red River and the Red River Compact

As noted by Petitioner, the Red River marks a significant portion of the boundary between Oklahoma and Texas. Disputes over the use and allocation of water in the Red River and its basin led to lengthy and painstaking negotiations among Texas,

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[41] *Id.* at 270.

[42] 2011 Region C Plan, p. 4D.13; 2001 Region C Plan, Freese and Nichols, Inc. *et al.* (Jan. 2001), pp. ES-16, ES-17, 5.52, 5.54, 7.12; 2006 Region C Plan, Freese and Nichols, Inc. *et al.*, pp. ES.10, 4D.16. available at http://www.twdb.state.tx.us/waterplanning/rwp/plans/2001/C/Region_C_2001_RWP.pdf and http://www.twdb.state.tx.us/waterplanning/rwp/plans/2006/C/Region_C_2006_RWP.pdf.

Oklahoma, Arkansas, and Louisiana, which ultimately led to the Red River Compact agreed to in 1978 and ratified by Congress in 1980. The Compact divides the Red River Basin into "reaches" and further divides those reaches into "subbasins." The Compact allocates the water in each subbasin to one or more of the signatory states.

As explained by Petitioner in its merits brief, § 5.05(b)(1) of the Compact clearly and unambiguously apportions the water in Reach II, Subbasin 5, and does so without reference to state lines. Specifically, the Compact grants to each of the signatory states "equal rights to the use" of all water "originating in subbasin 5" or "flowing into subbasin 5" with "no state entitled to more than 25 per cent of the excess water."[43]

B. An Express Purpose of the Compact is to Provide a Basis for State Planning, and the Compact Indeed Served as that Basis

One of the principal and expressly stated purposes of the Compact is:

> [t]o *provide a basis for state . . . planning* . . . by ascertaining each state's share in the

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[43] Tex. Water Code § 46.013 (West 2008), Compact § 5.05(b)(1).

> interstate water of the Red River Basin and the apportionment thereof.[44]

Notwithstanding the discriminatory Oklahoma laws that amount to an embargo preventing out-of-state users from obtaining water in Oklahoma, and the decision of the Tenth Circuit affirming those laws, the Compact has succeeded in fulfilling this purpose. The Compact provided a firm basis for Texas to plan to obtain water in Oklahoma for transport to Texas in accordance with allocations set forth in the Compact. Texas' 2012 State Water Plan expressly references the Compact (in addition to the four other interstate river compacts to which Texas is a signatory) stating that these compacts "as ratified by the legislature of each participating state and the U.S. Congress, represent agreements that establish how water should be allocated."[45]

As described above, obtaining water from Oklahoma is among the recommended major water management strategies to supply water to Tarrant, NTMWD, City of Irving, and UTRWD, adopted pursuant to the Texas' water planning process, and set forth in the 2011 Region C Water Plan.[46] Moreover, these projects to convey and transfer water from Oklahoma to Texas are identified as recommended

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[44] Compact § 1.01(e) (emphasis added).

[45] 2012 SWP at 29.

[46] *See supra* at 16.

projects in Texas 2012 State Water Plan.[47] Since as early as 2001, and in reliance on the express terms of the Compact, Texas has planned on obtaining water from Oklahoma, subject to the terms of the Compact, to meet its critical needs.

C. Texas' Water Planning Process Should Be Able to Rely on the Compact

As noted above, one of the principal purposes of the Compact is to serve as the basis for water planning in the signatory states. Texas' state and regional water planning process rightfully took into account and relied on the Compact in recommending major water management strategies and projects involving water from Oklahoma to meet the needs of Region C. Indeed, the water planning process in Texas should be able to rely on the Compact and its express terms.

D. The Tenth Circuit's or Respondents' Interpretation of the Compact Would Prevent Texas Entities from Pursuing Recommended Strategies Involving Obtaining Water from Oklahoma and Would Undermine the Integrity and Efficacy of Texas' Water Planning Process

Amicus TWCA agrees with and adopts Petitioner's argument that Compact language preempts

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[47] *See supra* at 17-18.

Oklahoma laws that prevent Texas from obtaining its share of Reach II, Subbasin 5, water from Oklahoma.[48] A conclusion that the Oklahoma laws at issue are not preempted by the Compact would undermine the integrity and efficacy of Texas' water planning process by preventing Texas from exercising its rights under the Compact and enjoying the benefit of the agreement that Texas reached with the other signatory states in 1978 and memorialized in the Compact and which, upon Congressional approval, became federal law. These rights and benefits were relied on by Texas' water planning process when establishing recommended water management strategies and projects involving water from Oklahoma. Oklahoma should not now be allowed to rewrite those terms and this Court should not abet and enable such efforts.

A decision that the Compact does not preempt the discriminatory Oklahoma laws that amount to an embargo on out-of-state users from obtaining water in Oklahoma would thwart and undermine Texas' water planning's reasonable and rightful reliance on the Compact. Texas' water planning process must be able to rely on the Compact as a basis for its long-range water planning.

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[48] Brief for Petitioner at 25-47.

Accordingly, TWCA supports Petitioner's Merits Brief and Petitioner's request that the Court reverse the decision of the Tenth Circuit

CONCLUSION

This Court should reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The

Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,

Petitioner,

v.

RUDOLF JOHN HERRMANN, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF UPPER TRINITY REGIONAL WATER DISTRICT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether Congress's approval of an interstate water compact that grants the contracting States "equal rights" to certain surface water and – using language present in almost all such compacts – provides that the compact shall not "be deemed * * * to interfere" with each State's "appropriation, use and control of water * * * not inconsistent with its obligations under this Compact," manifests unmistakably clear congressional consent to state laws that expressly burden interstate commerce in water.

2. Whether a provision of a congressionally approved multi-state compact that is designed to ensure an equal share of water among the contracting states preempts protectionist state laws that obstruct other states from accessing the water to which they are entitled to by the compact.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Texas Water Shortage and the *Amicus Curiae*'s Role in Addressing the Shortage

Upper Trinity Regional Water District ("Upper Trinity") is a regional, non-profit government agency created by the State of Texas to provide towns, cities, and utilities with regional water services, including a safe, reliable, long-term water supply. Upper Trinity – like Petitioner Tarrant Regional Water District – has a critical need to acquire water from parts of the Red River Basin located north of the main stem of the Red River in Oklahoma. Upper Trinity's service area includes all of Denton County and parts of two contiguous counties in North Texas. Those counties are part of the Dallas-Fort Worth metropolitan area and are three of sixteen counties in North Texas that make up the Texas Water Development Board's "Region C." Denton County is the fourth most populous county in Region C, behind Dallas, Tarrant and Collin Counties. *See* Texas Region C Water Planning Group, *2011 Region C Water Plan*, reprinted at https://www.twdb.state.tx.us/wrpi/rwp/3rdRound/2011_

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[1] The parties have filed blanket consents to the filing of *amicus* briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

RWP/RegionC ("2011 Plan"), Executive Summary at ES.2 (map), ES.14-ES.52.[2]

The population of Region C is projected to grow by 96 per cent, from some 6.6 million to 13.05 million in 2060. 2012 Plan at 46-47. The projected 2060 demand for water (some 3.27 million acre-feet) "will require the development of significant new water supplies for Region C over the next 50 years," with 92 per cent of those volumes allocated to municipal needs. 2011 Plan at ES.6; 2012 Plan at 46. It is important to understand that, during this same period, the Upper Trinity demand for water is projected to grow from 34,902 acre-feet per year to 156,545 acre-feet per year – a fourfold increase. *See* 2011 Plan at 2.26 (Table 2.21).

The 2011 Plan has identified water imported from Oklahoma as one of twelve "major" water sources needed to meet future Region C demand. *See* 2011 Plan at ES.10 (Table ES.1). This demand is projected to escalate from 1.76 million acre-feet in 2010 to 3.27 million acre-feet in 2060. *See* 2012 Plan at 47 (Table C.1). Upper Trinity is among four urban area suppliers in North Texas that will need water from the Red River Basin to meet its customer demand (*see* 2011 Plan at ES.10) and it is one of seven

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[2] The 2011 Plan is incorporated in Texas Water Development Board, *Water for Texas: 2012 State Water Plan*, reprinted at https://www.twdb.state.tx.us/publications/state_water_plan/2012/02.pdf at 44 ("2012 Plan"), the statewide plan that is promulgated by the Board every five years.

wholesale water providers that will be required to deliver much of the water demand projected for 2060. *See* 2011 Plan at ES.14 (Table ES.2) and 2012 Plan at 47, Table C.1.[3] To put these raw water demands in perspective, the *new supplies* that must be developed in the future make up some 45 per cent of Region C's projected 2060 requirements.

The facts surveyed above make Upper Trinity's substantial interest in this case self-evident. Equally self-evident is the substantial, adverse, and long-term impact on the citizens that Upper Trinity serves that would ensue should this Court affirm the Tenth Circuit's ruling.

The Oklahoma Water Surplus

The equities of this case might be very different if Oklahoma were in the same boat as North Texas. But that is not the case and Oklahoma does not suggest otherwise. In stark contrast to the worsening water shortage in North Texas that is quantified in the 2011 and 2012 Plans, Oklahoma has abundant water resources. The Oklahoma Water Resources Board has

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[3] As the Petitioner has shown, the Texas tributaries in Subbasin 5 that empty into the mainstem of the Red River primarily are dry arroyos. They are not a meaningful option for future supply. The Red River Compact itself apparently recognizes this geological fact by allocating Subbasin 5 as a unitary sector, ignoring the Oklahoma/Texas border. The relevant Compact language is treated throughout this brief, in the Petitioner's brief, and in other *amicus* briefs.

stated that "the average annual flow of the six major river basins in southeastern Oklahoma alone is 6,363,628 acre-feet." *See* Oklahoma Water Resources Board, *Status Report to the Office of the Governor* (2002), reprinted at http://www.owrb.ok.gov/studies/legislative/southeast/southeast_pdf/Status%20Report_Part%201.pdf 27. That is enough water to supply the entire State of Oklahoma three times over. *Id.* There is no bona fide contention that this much excess water flow is needed to preserve or enhance any downstream ecology or to prevent any adverse impact on Mississippi River navigation.

The Oklahoma Anti-Export Laws

The Oklahoma regulations that Respondent defends here effectively prohibit the export of water to other states. Oklahoma's underlying legal framework is unapologetically protectionist. Indeed in 2004 the Oklahoma Legislature "mandated a complete prohibition on the sale of water outside the state pending a comprehensive state-wide water study. . . ." Nicholas Andrew, *Interstate Water Transfers and the Red River Shootout,* 41 Tex. Envtl. L.J. 181, 182 & n. 8 (2011), *citing* Okla. Stat. Ann. tit. 82, § 1B ("Andrew"). The Oklahoma Legislature amended the prohibition statute in 2008 – during the pendency of litigation – "specifically to forbid Oklahoma water districts from issuing out-of-state export permits without the express approval of the Oklahoma legislature." Andrew, 41 Tex. Envtl. L.J. at 182 & n. 9. The prohibitionary Oklahoma statutes are quoted and

discussed at length in the Petitioner's brief. Andrew aptly labels those statutes, taken together, as an "anti-export law." *Id.* at 202 & n. 147. They are sometimes referred to collectively in this brief as the "Oklahoma anti-export laws."

Upper Trinity's Reliance on the RRC

The Red River Compact ("RRC" or "the Compact") at issue in this case was executed in September, 1979 and approved by Congress in 1980. Upper Trinity was founded in 1989 to serve the needs previously outlined herein. From its very birth, Upper Trinity was familiar with the RRC because water from the Red River Basin was a key component of the supply that Upper Trinity knew it would need to serve its market. There are other North Texas wholesale water providers in the same position. As the Petitioner has shown the Court in its brief, there never should have been any doubt about the plain meaning of the RRC language that allocates water from Reach II, Subbasin 5 to all Signatory States irrespective of state boundaries. It is fair to infer – indeed the inference is well-nigh compelled – that these North Texas providers relied heavily on this reading of the RRC in their respective planning efforts. As the data surveyed hereinabove shows, planning for the region's water future has been and will continue to be critical to assuring that water supplies will be equal to the needs of North Texas citizens in both the short and long term.

Potential Effect on Other Western United States Compacts

A final consideration that affects both Upper Trinity and a large number of other western United States water providers (and the citizens they serve) is the potential for mischief if the Tenth Circuit decision is affirmed. The mischief here is likely to take the form of added uncertainty, conflict and litigation amongst the many other states that are signatories to the other twenty-five river compacts in the western United States. As discussed in Part III *infra* (comparing the RRC to other compacts), many other compacts have terms substantively similar to those of the RRC. Such terms include allocations tied to interstate basins or river reaches *rather than* to state borders. Oklahoma's protectionist legislation is a brazen repudiation of that state's clear obligations under the RRC. Such protectionist actions, Upper Trinity respectfully submits, should not be encouraged, lest other compact parties (for politically-motivated or other reasons) decide to follow Oklahoma's example and seek to rewrite *their* compacts more favorably to their own citizens and voters.

SUMMARY OF ARGUMENT

1. The presumption against implied preemption of state law by federal law is predicated on federal deference to state law. Although an interstate compact is "transformed into a law of the United States"

when Congress approves it, no deference is genuinely implicated when the subject is an interstate compact. A compact, after all, is a contract negotiated, drafted and executed by the states themselves. The language of the compact – here the Red River Compact – should control.

2. The Oklahoma anti-export laws offend the dormant Commerce Clause. The Red River Compact guarantees all Signatory States "equal rights to . . . water flowing into subbasin 5" without reference to state boundaries. The Court of Appeals ignored that very specific language in favor of a collection of words and phrases scattered throughout the Compact that, according to the Tenth Circuit, somehow mandate a "wide berth" for the enactment of protectionist water legislation. The Red River Compact language has no "wide berth" effect. On the contrary, Congress' approval of the more specific, clear language quoted in this paragraph, and the other language analyzed by the Petitioner, is the diametric opposite of a manifestation of "unmistakably clear congressional consent" to state laws that expressly burden interstate commerce in water.

3. The Red River Compact is one of twenty-six water apportionment compacts. Its terms are not unique; rather it shares numerous similar provisions with other compacts. Hence the Tenth Circuit's interpretation of the RRC, if allowed to stand, may significantly affect numerous compacted water allocations throughout the western United States. A crazy-quilt of interpretations of structurally similar compacts –

many of which share verbatim language or substantively indistinguishable language – ought to be avoided if at all possible. Moreover, the manner in which other compacts have been interpreted and applied in practice may inform the Court's reading of the RRC itself.

ARGUMENT

I. THE RED RIVER COMPACT PREEMPTS STATE LAW THAT PROHIBITS TEXAS FROM WITHDRAWING ANY PART OF ITS SHARE OF SUBBASIN 5 WATER FROM OKLAHOMA.

At the heart of this case is the question of whether a state may avoid a multi-state water compact commitment by invocation of this Court's (putative) presumption against implied preemption. That is the narrow holding below. The no-preemption presumption may not be invoked to aid interpretation of the *meaning* of federal legislation, as opposed to its preemptive effect. *See Smiley v. CitiBank (S.D.)*, 517 U.S. 735, 743-44 (1996) and, most recently, *PLIVA, Inc. v. Mensing*, ___ U.S. ___, 131 S.Ct. 2567, 2577-78 (2011). Even more pertinent here, the application of the "presumption" (if indeed it survived *PLIVA*) to an interstate compact makes little sense. This Court has relied on the no-preemption presumption only "because respect for the States as 'independent sovereigns in our federal system' leads [it] to assume that 'Congress does not cavalierly pre-empt state-law

causes of action.'" *Wyeth v. Levine*, 555 U.S. 555, 565, n. 3 (2009), quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

No federal deference to state law is genuinely implicated when the subject is an interstate compact – a contract negotiated, drafted and executed by a group of states. The language of the compact itself – here the Red River Compact – should control. As Petitioner has shown, the Oklahoma anti-export laws cannot be reconciled with the parties' own agreements granting all Signatory States access to water in Reach II, Subbasin 5 irrespective of state boundaries. At a minimum, those express provisions impliedly preempt the Oklahoma laws (to say nothing of prohibiting Oklahoma's actions as a matter of pure contract interpretation).[4]

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[4] The Court of Appeals held that this case "does not concern" express preemption because "the Compact does not explicitly mention preemption." Court of Appeals Opinion ("Opin.") at 33. But the Compact itself limits state water regulation to a secondary, subordinate *intrastate* role. Section 2.07 of the Compact (unmentioned by the Tenth Circuit) makes it clear that nothing in the Compact shall be deemed to "impair or affect the powers, rights, or obligations" of the United States "in, over, and to water of the Red River Basin." Because the Congressionally enacted compact itself guarantees other states "equal rights to . . . water flowing into subbasin 5" *without regard to state boundaries*, arguably Section 2.07 in fact expressly preempts the Oklahoma anti-export laws.

II. OKLAHOMA'S PROTECTIONIST WATER LAWS VIOLATE THE DORMANT COMMERCE CLAUSE.

The Language of the RRC

Petitioner also has shown that the Oklahoma anti-export laws offend the dormant Commerce Clause, based on a plain reading of the Compact itself. Section 5.05(B)(1) guarantees all Signatory States "equal rights to . . . water flowing into subbasin 5" without reference to state boundaries. Congress having legislated that result by approving the Compact, the dormant Commerce Clause invalidates any legislation that renders Oklahoma's contract performance impossible. The Court of Appeals simply ignored the very specific language of Section 5.05(B) in favor of a collection of words and phrases scattered throughout the Compact. Those phrases taken together, the Tenth Circuit reasons, somehow mandate a "wide berth" for the enactment of protectionist water legislation. *See* Opin. at 28.

The Tenth Circuit compounded the effect of its upside down, general-controls-the-specific approach to contract/statutory interpretation by ignoring critically important Compact language that qualifies *all* of the putatively "broad" grants of authority to Oklahoma. *See* RESTATEMENT (SECOND) OF CONTRACTS § 203(c) (ALI 1981) ("specific terms and exact terms are given greater weight than general language"). First, each state's otherwise "freely administered" water rights shall be "subject to the availability of water in accordance with the apportionments made

by this Compact" (Section 2.01). Second, state law must be consistent with each state's expressly undertaken "obligations under this Compact" (Section 2.10(a)).

Respondent's dormant Commerce Clause argument is, in any event, question-begging and circular (*circulus in probando*). Oklahoma's argument goes like this: because the "plain language" of the Red River Compact *can be read to* allow Oklahoma to enact anti-export laws, then Congress must be deemed to have "consented" to such state laws (past and future) when it approved the Compact. The Court of Appeals, hewing to Oklahoma's argument, claims that "§5.05(b)(1) [of the RRC] itself can reasonably be read to foreclose Tarrant's interpretation," i.e., that "once water flows . . . past the last major dam site into Subbasin 5, *all four* signatory states are entitled to a portion of that water." *See* Opin. at 41 and Brief of Petitioner at 7-8 (emphasis in original). With respect, that is not a very ambitious claim. Such a "can-reasonably-be-read" standard falls far short of the *required* standard: Congress must "manifest its unambiguous intent before a federal statute will be read to permit" discriminatory state laws that otherwise would offend the negative implications of the Commerce Clause. *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992).

The congressional "consent" embodied in the approval of the Compact, Oklahoma's reasoning continues, nullifies the effect that the dormant Commerce Clause otherwise may have had. *See* Opin. at 27 ("words and phrases such as 'unrestricted use,'

'control,' 'in any manner,' 'freely administer,' and 'nothing shall be deemed to interfere' give the Oklahoma Legislature wide latitude to regulate interstate commerce"). The Court of Appeals' putative licensing of Oklahoma to "regulate interstate commerce" is jarring in its breadth. Be that as it may, the Oklahoma/Tenth Circuit dormant Commerce Clause "analysis" amounts to nothing more than a conclusory determination that the *Compact language itself* somehow authorizes Oklahoma's water export prohibition. After a lengthy discussion of the dormant Commerce Clause issue, the Court of Appeals seems to have acknowledged this circularity in its actual holding:

> In view of our conclusion that the Red River Compact gives Oklahoma wide berth to protect its compacted water against out-of-state transfer and use, *we do not address* whether the Oklahoma statutes that were challenged here would be constitutional under the dormant Commerce Clause in the absence of the Compact.

Id. at 28 (emphasis added).

Petitioner and other *amici* have shown that the Red River Compact language has just the opposite of a "wide berth" effect. The compact expressly allocates a share of water from tributaries in Reach II, Subbasin 5 to Texas and the other compact states irrespective of state boundaries. The Oklahoma anti-export laws are repugnant to that plain meaning and cannot be enforced, regardless of whether (i) those laws offend the dormant Commerce Clause (they do,

because Congress did not "consent" to them), or (ii) simply contravenes the Red River Compact itself. This Court, of course, is the ultimate arbiter of interstate compact disputes and may enforce the compact according to its clearly expressed intent. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 29 (1951).

Oklahoma's History of Protectionism

Oklahoma's water protectionism, unfortunately, is of a piece with the State's history of Commerce Clause encroachments. These have included: (i) the prohibition of transportation beyond the state border of natural gas produced by Oklahoma wells (*West v. Kansas Natural Gas Co.*, 221 U.S. 229, (1911)); (ii) the putative criminalization of the transportation for the sale outside the state of minnows seined or procured from Oklahoma waters (*Hughes vs. Oklahoma*, 441 U.S. 322 (1979)); and (iii) the requirement that Oklahoma coal-fired electric generating plants burn coal containing at least 10 per cent Oklahoma-mined coal (*Wyoming v. Oklahoma*, 502 U.S. 437 (1991)). Oklahoma has been a recidivist when it comes to Commerce Clause offenses. Indeed this is not the first time that this Court has been called upon to admonish the state against such protectionism. In *West*, for example, the Court held:

> The Statute of Oklahoma recognizes (gas) to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. . . . If the States have

> such power a singular situation might result. *Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals.* And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? *If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that "in matters of foreign and interstate commerce there are no state lines."* In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court.

221 U.S. at 255-56 (emphasis added).

In *Hughes,* defendant Hughes was arrested by an Oklahoma Game Ranger and convicted of violating an Oklahoma Statute by transporting minnows from Oklahoma to Wichita Falls, Texas. Hughes held a license to operate a commercial minnow business

there. Citing *Geer v. Connecticut*, 161 U.S. 519 (1896), the lower courts in *Hughes* sanctioned Oklahoma's power to prohibit removal of minnows from the state. *Geer* was predicated on the judicial fiction that game birds lawfully killed within the state are the property of citizens who "own," in common, all wild animals within the state. *Hughes* overruled *Geer*. The *Hughes* Court held that, like the Oklahoma anti-export laws at issue here, the Oklahoma minnow-removal statute on its face discriminated against interstate commerce by overtly blocking the flow of interstate commerce at the state's border. The Court explained that States may promote the legitimate purpose of protecting and conserving wild animal life within their respective borders – as with water resources – only in ways that are consistent with the basic principle that the relevant economic unit is the Nation.

In *Wyoming v. Oklahoma*, this Court exercised its original jurisdiction to vitiate Oklahoma's effort to favor its citizens at the expense of another state's citizens. The recitals and resolutions of the Oklahoma Legislature in passing the law – requiring that Oklahoma power plants burn Oklahoma coal – mirror the Oklahoma Legislature's justifications for the anti-export water laws at issue here. Thus:

> 'WHEREAS, the use of Oklahoma coal would save significant freight charges on out-of-state coal from the State of Wyoming; and
>
> 'WHEREAS, the savings on such freight charges could offset any possible costs associated with plant adjustments; and

> 'WHEREAS, the coal-fired electric plants being used by Oklahoma utilities are exclusively using Wyoming coal; and
>
> 'WHEREAS, the Oklahoma ratepayers are paying $300 million annually for Wyoming coal; and
>
> 'WHEREAS, a 1982 Ozark Council Report states that $9 million of the ratepayer's dollars was paid as severance tax to the State of Wyoming. . . .
>
> 'NOW, THEREFORE, BE IT RESOLVED. . . ."
>
> 'THAT Oklahoma utilities using coal-fired generating plants seriously consider using a blend of at least ten percent Oklahoma coal with Wyoming coal and continue to meet air quality standards.
>
> 'THAT the result of such a blend would assure at least a portion of the ratepayer dollars remaining in Oklahoma and enhancing the economy of the State of Oklahoma.'

502 U.S. at 443.

As the natural gas, minnows, and coal cases all reveal, Oklahoma has made a habit of enacting legislation over the last century that, if not invalidated by the federal courts, would defeat Commerce Clause objectives. Those objectives – carefully balanced to protect state regulation that steers clear of interference with interstate commerce – assure the efficient operation of a national (and increasingly

global) economy. In regions that lie east of Oklahoma (including RRC members Arkansas and Louisiana), water is not the scarce commodity that it is in Texas. If Oklahoma's Southeast counties, which also are water rich, are prevented from providing their share of water from the RRC to Texas, Colorado will be tempted to hoard water at the expense of California, Nebraska will be tempted to do the same at the expense of Kansas, and state after state in the arid West will draw artificial lines at their borders. This Court should act before any such water wars get under way.

Sporhase v. Nebraska is Controlling

The decision in *Sporhase v. Nebraska*, 458 U.S. 941 (1982), is based in part on many of the pertinent Oklahoma decisions disallowing state protectionism. A Nebraska statute there provided that any person who intended to withdraw groundwater from any well located in the state and transported for use in an adjoining state must obtain a permit from the Nebraska Department of Water Resources. *Sporhase* holds that groundwater is subject to commerce clause scrutiny. Moreover, the Court held that the State of Nebraska's interest in conserving and preserving scarce water resources had an interstate dimension. The multi-state character of the Ogallala Aquifer underlying parts of Texas, New Mexico, Oklahoma and Kansas demonstrated the federal interest in conservation as well as in fair allocation of diminishing water resources.

Sporhase holds that the "reciprocity" requirement of the Nebraska statute contravened the commerce clause and imposed an impermissible burden on interstate commerce. The Nebraska statute was held to operate as an "explicit barrier" to commerce between Nebraska and its adjoining states. As with the Oklahoma anti-export laws, there was no close fit between the Nebraska restriction and the asserted local purpose. Neither statutory scheme can survive the "strictest scrutiny" reserved for facially discriminatory legislation. Finally, the *Sporhase* Court held that Congress had not granted the states permission to engage in groundwater regulation that otherwise would be impermissible. Neither the fact that Congress had chosen *not* to create a federal water law to govern all water rights, nor the fact that Congress had been willing to let the states settle their difference through mutual agreements (i.e., compacts), dissuaded the Court from striking down Nebraska's protectionist laws. Those congressional forebearances did not constitute the kind of persuasive evidence required to demonstrate that Congress had consented to the unilateral imposition of unreasonable burdens on commerce.

In *Sporhase*, Justice Stevens relied in part on a previous dispute between Oklahoma and Texas adjudicated in *City of Altus v. Carr*, 385 U.S. 35 (1966). In the latter case, the Court invalidated a Texas statute that, like the anti-export laws here, forbade the interstate exportation of water without

the approval of the state legislature. Justice Stevens explained in *Sporhase*:

> Appellee insists, however, that Nebraska water is distinguishable from other natural resources. The surface owner who withdraws Nebraska ground water enjoys a lesser ownership interest in the water than the captor of game birds in Connecticut or minnows in Oklahoma or ground water in Texas, for in *Geer*, *Hughes* and *City of Altus* the States permitted intrastate trade in the natural resources once they were captured. Although appellee's greater ownership interest may not be irrelevant to Commerce Clause analysis, it does not absolutely remove Nebraska ground water from such scrutiny. For appellee's argument is still based on the legal fiction of state ownership.

The past is prologue and Oklahoma's anti-export laws mirror the Texas' protectionist water laws of the past. "Although water is indeed essential for human survival," *Sporhase* notes, "studies indicate that over 80% of our water supplies" are used for agricultural purposes. 458 U.S. at 951. The agricultural markets supplied by irrigated farms "are worldwide." *Id.* Those markets "provide the arch[e]typical example of commerce among the several States for which the Framers of our Constitution intended to authorize federal regulation." *Id.* The Oklahoma anti-export laws form the beginning of a chain of dominoes that, once toppled, threaten to hinder commerce among the several states.

III. COMPARISON OF THE RED RIVER COMPACT TO OTHER INTERSTATE RIVER COMPACTS AIDS INTERPRETATION OF THE RRC.

The Petitioner has shown that the RRC, within its four corners, mandates reversal of the Court of Appeals and enforcement of the rights that the Compact grants Texas. By way of augmenting Petitioner's showings concerning the particular provisions of the RRC, Upper Trinity believes that a consideration of where that compact fits in the larger matrix of interstate water compacts may be beneficial. This Court has exercised the power of equitable apportionment of interstate streams since 1907. *See* A. Dan Tarlock, *Law of Water Rights and Resources* § 10:4 at 10-3 & n. 1 (2010), *citing Kansas v. Colorado,* 206 U.S. 46 (1907). Indeed it is clear that, in the absence of a governing interstate compact, this Court has the responsibility for equitably apportioning river water throughout the United States. Tarlock at § 10:28 (2010). Still "[i]nterstate compacts are said to be the preferred method of allocating interstate waters." *Id.* at 10:24 at 10-36 & n. 1, *citing, inter alia,* Charles J. Meyers, *The Colorado River,* 19 Stan. L. Rev. 1, 48-50 (1966).

The Red River Compact is one of twenty-six water apportionment compacts. Its terms are *not* unique; rather it shares numerous similar provisions with other compacts. Hence the Tenth Circuit's interpretation of the RRC, if allowed to stand, may significantly affect numerous compacted water allocations

throughout the western United States. Upper Trinity respectfully submits that a crazy-quilt of interpretations of structurally similar compacts – many of which share verbatim language or substantively indistinguishable language – ought to be avoided if at all possible. Moreover, the manner in which other compacts have been interpreted and applied in practice may inform the Court's reading of the RRC itself.

General Categories of Compacts

There are two basic types of interstate water apportionment compacts: (1) compacts that apportion all the waters within an interstate watershed between the signatory states; and (2) compacts that first divide an interstate watershed into reaches and/or subbasins, and then apportion the waters within those sectors between states. The RRC is the second type of compact. It divides the Red River Basin into five separate reaches and numerous topographical subbasins, then allocates the water in each reach and subbasin to Oklahoma, Texas, Arkansas and/or Louisiana. Five other compacts allocate water the same way.[5]

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[5] They are the *Klamath River Compact*, 69 Stat. 613 (1955), 71 Stat. 497 (1957) (California and Oregon); the *Bear River Compact*, 72 Stat. 38 (1958) (Idaho, Utah, and Wyoming); the *Republican River Compact*, Pub. L. No. 78-60 (1957) (Colorado, Kansas, and Nebraska); the *Yellowstone River Compact*, 63 Stat. 152 (1949), 65 Stat. 663 (1951) (Montana, North Dakota, and

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Division of Interstate Watersheds Into Reaches by Plainly Defined Upstream and Downstream Points.

Some compacts divide interstate watersheds into reaches by plainly defined upstream and downstream points on the relevant watercourses.[6] An allocation by upstream and downstream points would not be feasible in the Red River Basin for two reasons. First, the Red River does not actually flow into Texas; hence it cannot be divided by such points.[7] Second, as it relates to Subbasin 5, the mainstem of the Red River is highly saline and thus not a viable source of potable water. Rather, the primary locations at which to divert potable water in Subbasin 5 are points along the freshwater tributaries to the Red River immediately before they discharge into the mainstem and become contaminated with chloride. Accordingly, the

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Wyoming); and the *Arkansas River Basin Compact, Arkansas-Oklahoma, 1970*, 87 Stat. 569 (1970) (Arkansas and Oklahoma).

[6] *E.g.*, the *Bear River Compact*, Art. II(2)-(5) and the *Yellowstone River Compact*, Art. V(B)(1)-(4). *See* citations to Statutes at Large and Public Law numbers in Note 5 *supra*.

[7] Oklahoma's southern border – and Arkansas's southern border east of the Oklahoma/Arkansas border – lies south of the Red River. Oklahoma first argued in the district court that its only obligation was to deliver sufficient volumes of water "downstream" to Texas and that Texas must "wait" for the water to cross the border to take its share. When it became clear that this argument was unavailing (because *its own border* lies south of the Red River and the river never flows into Texas), Oklahoma segued to the position that it could appropriate to itself all Subbasin 5 tributary and mainstem water that flows within its own borders and prohibit "export" to Texas.

linchpin of the Subbasin 5 allocation is the location of last-chance freshwater sources, all of which lie within Oklahoma's boundaries.

The RRC gives each state "equal rights" to waters within a *single subbasin*. Moreover, the last major dam sites in Oklahoma (i.e., the furthest downstream) correspond exactly to federal reservoir projects located in Oklahoma that were authorized by Congress to store water for use in both Oklahoma and Texas. Section 2.02 of the RRC expressly states that water stored in these reservoirs must be released and used in accordance with the projects' federal authorizing acts. By making the dam sites the upper border points of Subbasin 5, and granting each state "equal rights" to the downstream waters, the RRC facilitates the federal projects by enabling water to be released into Subbasin 5 for transport to Texas.

The nature of the Red River hydrology indeed makes it clear that Oklahoma's reading of the Subbasin 5 provisions of the RRC cannot withstand scrutiny. Oklahoma maintains that, notwithstanding the federal authorizing legislation for the Texas and Oklahoma reservoirs, all water within the last-chance reservoirs has been allocated exclusively to Oklahoma. Oklahoma's argument can be squared neither with the plain language of the Compact nor with its "borderless," structural similarity to so many other compacts. The parties to those compacts have never questioned that signatory states may appropriate – from locations lying wholly within the borders of an adjacent state – water from an allocated basin or

reach. Upper Trinity and others in its position share a legitimate concern that the Tenth Circuit's decision in this case may actually foment water wars where peace has long prevailed.

Reaches and Subbasins Lying Completely Within the Boundaries of One State

When a particular reach or subbasin lies completely within the boundaries of one state, a compact may allocate all of the waters within that reach or subbasin to the state for its "free and unrestricted use." Similarly, many compacts provide a state with "free and unrestricted use" of the waters within a multi-state reach or subbasin that are found within its borders.[8] To Upper Trinity's knowledge, no compact or reported decision has defined the term "free and unrestricted use." But a plain-meaning reading of the language would be that a state has the right to use the waters within its borders free from obligation to deliver some or all of the resource to another state or downstream point of diversion. As the Petitioner has shown, the RRC allocates water in some sectors of the Red River Basin in just that way. *But those provisions are not at issue here.*

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[8] *E.g.*, the *Arkansas River Basin Compact, Arkansas-Oklahoma, 1970*, 87 Stat. 569 (1970), Art. IV(A), (B), (E); the *Pecos River Compact*, 63 Stat. 159 (1949), Art. III(b); the *Red River Compact*, 94 Stat. 3305 (1980), Secs. 4.02(b), 4.03(c), 5.01(b), 5.02(b), 6.01(b), 7.01(b), 8.01; and the *Republican River Compact*, Pub. L. No. 78-60 (1957), Art. IV.

Upper Trinity respectfully submits that the very contrast between the Reach II, Subbasin 5 language of the RRC, on the one hand, and the allocation-by-state RRC language governing *other* Red River basins, on the other hand, serves to underscore the Petitioner's common-sense reading of the Subbasin 5 allocation. When the compacting states intended to allocate water by state – and *not* by reference to the subbasin independently of state borders – they did exactly that. To put it another way, if the drafters of the RRC had intended to further divide Subbasin 5 along state lines into three *sub-subbasins*, there is every reason to conclude that the RRC would have so provided expressly. Indeed if the RRC had conformed to the pattern of other compacts, it would have effected the sub-subbasin scheme by employing clear and direct language.

Allocation of Multistate Watersheds, River Reaches, Basins and Subbasins

As noted at the outset of the discussion in this section, some water compacts, or sections thereof, divide the waters of multistate river reaches or basins among multiple states without regard to state lines. Those compacts include the RRC and eight others.[9]

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[9] They are the *Klamath River Compact*, 69 Stat. 613 (1955), 71 Stat. 497 (1957) (California and Oregon); the *Bear River Compact*, 72 Stat. 38 (1958) (Idaho, Utah, and Wyoming); the *Republican River Compact*, Pub. L. No. 78-60 (1957) (Colorado, Kansas, and Nebraska); the *Yellowstone River Compact*, 63 Stat.

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The RRC's apportionment of the waters of Reach II, Subbasin 5 conforms to this pattern. Section 5.05(a) of the RRC defines the allocated area with specificity as:

> . . . that portion of the Red River, together with its tributaries, from Denison Dam down to the Arkansas-Louisiana state boundary, excluding all tributaries included in the other four subbasins of Reach II [which are defined by express latitudinal/longitudinal coordinates].

Subbasin 5 reaches into Oklahoma, Texas and Arkansas. Section 5.05(b)(1) of the RRC apportions the waters of the subbasin equally amongst Texas, Oklahoma, Arkansas, and Louisiana, without any reference to state borders. That section then provides that the "Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5 . . . ."

Again the borderless allocation described here replicates the scheme common to eight other compacts.[10] If Oklahoma is allowed to abjure its obligations under

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152 (1949), 65 Stat. 663 (1951) (Montana, North Dakota, and Wyoming); the *Belle Fourche River Compact*, 58 Stat. 94 (1944) (South Dakota and Wyoming); the *California-Nevada Interstate Compact* (ratified by California and Nevada; not yet enacted by Congress); the *Snake River Compact*, 62 Stat. 294 (1948); 64 Stat. 29 (1950) (Idaho and Wyoming); and the *Upper Colorado River Basin Compact*, 63 Stat. 31 (1949).

[10] *See* Note 9 *supra*.

the RRC, then the potential for uncertainty amongst the signatories to the eight other compacts identified in this brief is obvious. The presence of such provisions in the other compacts and their parties' adherence to them over the years – in contrast to Oklahoma's protectionism – is itself persuasive evidence of the intended meaning of the type of allocation employed in the RRC.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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